

**REDEFINING COMPANION CARE:  
JEOPARDIZING ACCESS TO AFFORDABLE CARE FOR  
SENIORS AND INDIVIDUALS WITH DISABILITIES**

---

**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON WORKFORCE PROTECTIONS  
COMMITTEE ON EDUCATION  
AND THE WORKFORCE  
U.S. HOUSE OF REPRESENTATIVES  
ONE HUNDRED THIRTEENTH CONGRESS  
FIRST SESSION

---

HEARING HELD IN WASHINGTON, DC, NOVEMBER 20, 2013

---

**Serial No. 113-39**

---

Printed for the use of the Committee on Education and the Workforce



Available via the World Wide Web:  
[www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education](http://www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education)  
or  
Committee address: <http://edworkforce.house.gov>

---

U.S. GOVERNMENT PRINTING OFFICE  
85-586 PDF

WASHINGTON : 2014

---

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Internet: [bookstore.gpo.gov](http://bookstore.gpo.gov) Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

## COMMITTEE ON EDUCATION AND THE WORKFORCE

JOHN KLINE, Minnesota, *Chairman*

Thomas E. Petri, Wisconsin	George Miller, California, <i>Senior Democratic Member</i>
Howard P. "Buck" McKeon, California	Robert E. Andrews, New Jersey
Joe Wilson, South Carolina	Robert C. "Bobby" Scott, Virginia
Virginia Foxx, North Carolina	Rubén Hinojosa, Texas
Tom Price, Georgia	Carolyn McCarthy, New York
Kenny Marchant, Texas	John F. Tierney, Massachusetts
Duncan Hunter, California	Rush Holt, New Jersey
David P. Roe, Tennessee	Susan A. Davis, California
Glenn Thompson, Pennsylvania	Raúl M. Grijalva, Arizona
Tim Walberg, Michigan	Timothy H. Bishop, New York
Matt Salmon, Arizona	David Loebsack, Iowa
Brett Guthrie, Kentucky	Joe Courtney, Connecticut
Scott DesJarlais, Tennessee	Marcia L. Fudge, Ohio
Todd Rokita, Indiana	Jared Polis, Colorado
Larry Bueshon, Indiana	Gregorio Kilili Camacho Sablan, Northern Mariana Islands
Trey Gowdy, South Carolina	Frederica S. Wilson, Florida
Lou Barletta, Pennsylvania	Suzanne Bonamici, Oregon
Martha Roby, Alabama	Mark Pocan, Wisconsin
Joseph J. Heck, Nevada	
Susan W. Brooks, Indiana	
Richard Hudson, North Carolina	
Luke Messer, Indiana	

Juliane Sullivan, *Staff Director*  
Jody Calemine, *Minority Staff Director*

---

## SUBCOMMITTEE ON WORKFORCE PROTECTIONS

TIM WALBERG, Michigan, *Chairman*

John Kline, Minnesota	Joe Courtney, Connecticut, <i>Ranking Member</i>
Tom Price, Georgia	Robert E. Andrews, New Jersey
Duncan Hunter, California	Timothy H. Bishop, New York
Scott DesJarlais, Tennessee	Marcia L. Fudge, Ohio
Todd Rokita, Indiana	Gregorio Kilili Camacho Sablan, Northern Mariana Islands
Larry Bueshon, Indiana	Mark Pocan, Wisconsin
Richard Hudson, North Carolina	

## C O N T E N T S

---

	Page
Hearing held on November 20, 2013 .....	1
<b>Statement of Members:</b>	
Courtney, Hon. Joe, ranking member, Subcommittee on Workforce Protections .....	4
Prepared statement of .....	5
Walberg, Hon. Tim, Chairman, Subcommittee on Workforce Protections ..	1
Prepared statement of .....	3
<b>Statement of Witnesses:</b>	
Andrews, Lucy, vice chair, National Association for Home Care & Hospice .....	7
Prepared statement of .....	8
Bensmihen, Joseph, president and CEO, United Elder Care Services, Inc. ....	10
Prepared statement of .....	12
Kulp, Karen, president and CEO, Home Care Associates .....	15
Prepared statement of .....	17
Passantino, Alexander J., senior counsel, Seyfarth Shaw LLP .....	22
Prepared statement of .....	24
<b>Additional Submissions:</b>	
Ms. Kulp:	
"Value the Care" updates, nos. 5-8, Internet addresses to .....	20
Jan. 2013 data brief, Internet address to .....	20
Mar. 2013 data brief, Internet address to .....	20
AFSCME letter, dated Nov. 19, 2013, on DOL's companionship rule ..	21
Pocan, Hon. Mark, a Representative in Congress from the State of Wisconsin:	
Brown, Venus, homecare provider, Milwaukee, WI, prepared statement of .....	49
Chairman Walberg:	
Mark, James, president, Private Care Association, Inc., prepared statement of .....	45
Terry, Hon. Lee, a Representative in Congress from the State of Nebraska, prepared statement of .....	47



**REDEFINING COMPANION CARE:  
JEOPARDIZING ACCESS TO  
AFFORDABLE CARE FOR SENIORS  
AND INDIVIDUALS WITH DISABILITIES**

---

**Wednesday, November 20, 2013  
U.S. House of Representatives  
Subcommittee on Workforce Protections  
Committee on Education and the Workforce  
Washington, DC**

---

The subcommittee met, pursuant to call, at 10:03 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Rokita, Courtney, Andrews, and Pocan.

Staff present: Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Senior Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; Daniel Murner, Press Assistant; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Alexa Turner, Legislative Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Melissa Greenberg, Minority Staff Assistant; Leticia Mederos, Minority Senior Policy Advisor; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; Michael Zola, Minority Deputy Staff Director; and Mark Zuckerman, Minority Senior Economic Advisor.

Chairman WALBERG. A quorum being present, the subcommittee will come to order. Good morning to each of you, and welcome to our guests. We have assembled a distinguished panel of witnesses and thank you all for joining us this morning.

America's families are hurting. More than 11 million workers are searching for a job. Wages are stagnant. Pain is felt every day at the gas pump. Health care costs are rising, and now millions are losing the health care plan they like thanks to the President's government-run health care scheme.

We should be working together to revive our struggling economy. We should be working across the aisle on solutions that will lift the middle class and spur job growth. We should set aside our dif-

ferences and advance bold reforms that will raise the wages of all working Americans and create opportunity for all who seek it.

I wish we were here today to discuss a proposal by the President that would help us achieve these goals. Unfortunately, no such proposal exists. Instead, we are here to examine something that is all too common under this administration; a new regulation that will create more hardship for some of our nation's most vulnerable citizens.

Congress has a responsibility to conduct oversight of the rules put forth by the administration, especially those that do more harm than good. Today's hearing is part of that effort.

For nearly 40 years Congress has recognized the invaluable service delivered by in-home companion care workers. In 1974, the Fair Labor Standards Act was extended to workers providing domestic services, but Congress deliberately exempted in-home companion care workers.

This wasn't because lawmakers valued these workers less than other domestic workers; quite the opposite. Policymakers realized many Americans rely upon the support of companion-care workers in order to maintain a safe, healthy, and productive lifestyle in their own homes.

The need for in-home companionship care is tremendous, especially among elderly and disabled individuals. Roughly 57 percent of people receiving these services are age 65 or older and approximately 73 percent have functional limitations. The intent of Congress was to protect a vulnerable group of Americans, yet that protection is being discarded by the Obama administration.

A regulation finalized by the Department of Labor eliminates the exemption for companion care workers employed by a third-party, as well as the exemption for workers jointly employed by a third-party and the individual receiving care.

Only caregivers hired directly by the person in need or a family member are eligible to receive the exemption. While that may sound like a simple rule, it is not. Under these circumstances, caregivers still have to follow a rigid set of arbitrary standards in order to receive the exemption Congress has created.

For example, the caregiver can only spend 20 percent of a work-week performing personal care duties, which the department says includes dressing, grooming, feeding, and light housework.

The delivery of care can only be offered in conjunction with fellowship and protection, which the rule defines—again arbitrarily—to include conversation, reading, games, errands, and walks, as well as monitoring safety and well-being. The department even goes so far as to define what is acceptable and unacceptable household work.

This is a highly prescriptive, intrusive standard imposed on vulnerable Americans. How are they supposed to track and maintain records on the services their caregivers provide?

Will they be subject to audit and punishment by federal authorities if they fail to follow every dictate prescribed in the regulation? Why does the administration believe it has the authority to micro-manage the care an individual receives in the comfort of his or her own home?

Last year I urged the administration to offer a clear and compelling reason why this regulation was necessary, especially at a time when so many Americans are struggling to get by.

To date they have failed to do so. Platitudes about babysitters and other political rhetoric don't justify this significant departure from long-standing companion care policies. The consequences will be far reaching.

Those who directly employ caregivers will simply terminate those relationships; the costs and uncertainty of complying with the new mandates will be too great. Others will have less access to affordable in-home companion care.

The daily routine and personalized care seniors and individuals with disabilities rely upon will be disrupted. Some will have no choice but to leave their homes and enter institutional living situations, and let us not forget that workers themselves will also be hurt as their employers restrict hours to help manage costs.

Companion caregivers often work long hours and under difficult circumstances that we ought to be grateful, extremely grateful for. The services they provide are critical. They, like all Americans, deserve responsible solutions that will help grow our economy and promote the income security of their families.

Regrettably, the administration's effort to redefine companion care moves our country in the opposite direction. In fact, I am afraid it will make the challenges facing these workers and vulnerable Americans worse. They deserve better. They deserve our support.

With that, I will now recognize the senior democrat member of the subcommittee, my friend, Representative Joe Courtney, for his opening remarks.

[The statement of Mr. Walberg follows:]

**Prepared Statement of Hon. Tim Walberg, Chairman,  
Subcommittee on Workforce Protections**

Good morning and welcome to our guests. We have assembled an excellent panel of witnesses; thank you all for joining us.

America's families are hurting. More than 11 million workers are searching for a job. Wages are stagnant. Pain is felt every day at the gas pump. Health care costs are rising. And now millions are losing the health care plan they like thanks to the president's government-run health care scheme.

We should be working together to revive our struggling economy. We should be working across the aisle on solutions that will lift the middle class and spur job growth. We should set aside our differences and advance bold reforms that will raise the wages of all working Americans and create opportunity for all who seek it.

I wish we were here today to discuss a proposal by the president that would help us achieve these goals. Unfortunately, no such proposal exists. Instead, we are here to examine something that is all too common under this administration: A new regulation that will create more hardship for some of our nation's most vulnerable citizens. Congress has a responsibility to conduct oversight of the rules put forth by the administration, especially those that do more harm than good. Today's hearing is part of that effort.

For nearly 40 years Congress has recognized the invaluable service delivered by in-home companion care workers. In 1974 the Fair Labor Standards Act was extended to workers providing domestic services, but Congress deliberately exempted in-home companion care workers. This wasn't because lawmakers valued these workers less than other domestic workers. Quite the opposite: policymakers realized many Americans rely upon the support of companion care workers in order to maintain a safe, healthy, and productive lifestyle in their own homes.

The need for in-home companionship care is tremendous, especially among elderly and disabled individuals. Roughly 57 percent of people receiving these services are age 65 or older and approximately 73 percent have functional limitations. The intent

of Congress was to protect a vulnerable group of Americans, yet that protection is being discarded by the Obama administration.

A regulation finalized by the Department of Labor eliminates the exemption for companion care workers employed by a third-party, as well as the exemption for workers jointly employed by a third-party and the individual receiving care. Only caregivers hired directly by the person in need or a family member are eligible to receive the exemption. While that may sound like a simple rule, it is not. Under these circumstances, caregivers still have to follow a rigid set of arbitrary standards in order to receive the exemption Congress created.

For example, the caregiver can only spend 20 percent of a workweek performing personal care duties, which the department says includes dressing, grooming, feeding, and light housework. The delivery of care can only be offered in conjunction with fellowship and protection, which the rule defines—again arbitrarily—to include conversation, reading, games, errands, and walks, as well as monitoring safety and well being. The department even goes so far as to define what is acceptable and unacceptable household work.

This is a highly prescriptive, intrusive standard imposed on vulnerable Americans. How are they supposed to track and maintain records on the services their caregivers provide? Will they be subject to audit and punishment by federal authorities if they fail to follow every dictate prescribed in the regulation? Why does the administration believe it has the authority to micromanage the care an individual receives in the comfort of his or her own home?

Last year I urged the administration to offer a clear and compelling reason why this regulation was necessary, especially at a time when so many Americans are struggling to get by. To date they have failed to do so. Platitudes about babysitters and other political rhetoric don't justify this significant departure from long-standing companion care policies. The consequences will be far reaching.

Those who directly employ caregivers will simply terminate those relationships; the costs and uncertainty of complying with the new mandates will be too great. Others will have less access to affordable in-home companion care. The daily routine and personalized care seniors and individuals with disabilities rely upon will be disrupted. Some will have no choice but to leave their homes and enter institutional living. And let us not forget that workers will also be hurt as their employers restrict hours to help manage costs.

Companion caregivers often work long hours and under difficult circumstances. The services they provide are critical. They—like all Americans—deserve responsible solutions that will help grow our economy and promote the income security of their families. Regrettably, the administration's effort to redefine companion care moves our country in the opposite direction. In fact, I'm afraid it will make the challenges facing these workers and vulnerable Americans worse. They deserve better. They deserve our support.

With that, I will now recognize the senior Democratic member of the sub-committee, Representative Joe Courtney, for his opening remarks.

---

Mr. COURTNEY. Thank you, Mr. Chairman.

I want to welcome and thank all the witnesses that are here today for your testimony.

We are here to discuss a final rule issued by the Department of Labor to ensure that our nation's 2 million professional hard-working home healthcare workers get paid the minimum wage and overtime compensation they deserve just like other hourly workers all throughout the U.S. economy.

As you know, the Department of Labor's final rule modernizes the current exemption to the Fair Labor Standards Act by ensuring that home healthcare providers who help the elderly or disabled with tasks such as dressing, feeding, bathing, meal preparation, and other important daily functions receive the benefit of today's bedrock wage protections that have been on the books since the 1930s.

This rule is particularly important to women who make up almost 90 percent of the in-home care workforce. With an average pay of just over \$20,000, these in-home health workers have earn-

ings so low that there are many states where they are eligible for some form of public assistance, including food stamps.

It is clear that people performing these often backbreaking tasks, day in and day out, deserve a fair week's wages. The way we take care of our elderly has changed dramatically since 1974 when the exemption was put into law.

It was originally meant to exempt casual babysitting and informal companions for the elderly. Today, those taking care of the elderly, sick, and disabled are often professional home-care workers not just companions.

The rule makes clear that these workers employed by third parties, such as staffing agencies, will be entitled to minimum wage and overtime protections. This rule will also help stabilize and encourage employment in the field, which is necessary to meet the growing workforce demands for in-home care services.

As we all know, the baby boomers are aging and demand for in-home care in the past decade has skyrocketed. As a result, the in-home care services industry is projected to exceed \$100 billion annually in the near future.

The rule also makes clear that home healthcare workers hired directly by families to perform fellowship and protection-related tasks are still considered companions and will continue to be exempt even if they engage in some direct care activities, such as dressing and feeding for less than 20 percent of their work week.

Some opponents of the rule claim that paying these hard-working home care workers will lead to higher rates of institutional care. However, independent studies of the 15 states, 15 states that already have these worker protections in place—and I want to salute the chairman's State of Michigan, which has had these protections in place for a number of years and has not capsized the delivery of services as some of the opponents claim, have shown no higher rates of institutionalization.

In finalizing this rule the Department of Labor took into account the many constructive comments made during the rulemaking process in order to make the final rule more flexible and clearer than the rule that was originally proposed.

The department also delayed the effective date of this rule until January 1, 2015 so that all parties would have adequate time to understand and prepare for the new rule.

In closing, I want to thank again all of the witnesses for coming today to discuss the Department of Labor's finalized rule. I look forward to hearing your testimony, and I yield back.

[The statement of Mr. Courtney follows:]

**Prepared Statement of Hon. Joe Courtney, Ranking Member,  
Subcommittee on Workforce Protections**

MR. CHAIRMAN: I want to welcome and thank today's witnesses. We are here today to discuss a final rule issued by the Department of Labor to ensure that our nation's 2 million professional, hardworking home health care workers get paid the minimum wage and overtime compensation they deserve, just like other hourly workers.

As you know, the Department of Labor's Final Rule modernizes the current exemption to the Fair Labor Standards Act by ensuring that home health care providers who help the elderly or disabled with tasks such as dressing, feeding, bathing, meal preparation, and other important daily functions receive the benefit of the law's bedrock wage protections.

This rule is particularly important to women, who make up almost 90 percent of the in-home care workforce.

With an average pay of just over \$20,000, these in-home health workers have earnings so low that there are many states where they are eligible for some form of public assistance. It is clear that the people performing these often backbreaking tasks day-in-and-day-out, deserve a fair week's wages.

The way we take care of our elderly has changed dramatically since 1974, when the exemption was put into law. It was originally meant to exempt casual babysitting and informal companions for the elderly. Today, those taking care of the elderly, sick and disabled are often professional home care workers, not just companions. The rule makes clear that these workers employed by third parties, such as staffing agencies, will be entitled to minimum wage and overtime protections.

This rule will also help stabilize and encourage employment in this field, which is necessary meet the growing workforce demands for in-home care services. As we all know, the baby boomers are aging, and demand for in-home care in the past decade has skyrocketed. As a result, the in-home care services industry is projected to exceed \$100 billion annually in the near future.

The rule also makes clear that home healthcare workers hired directly by families—who perform fellowship and protection related tasks—are still considered companions and will continue to be exempt, even if they engage in some direct care activities, such as dressing and feeding, for less than 20% of their workweek.

Some opponents of this rule claim that paying these hard working home care workers will lead to higher rates of institutional care. However, independent studies of the states that already have these worker protections in place have shown no higher rates of institutionalization.

In finalizing this rule, the Department of Labor took into account the many constructive comments made during the rulemaking process in order to make the final rule more flexible and clearer than the rule which was originally proposed. The Department also delayed the effective date of this rule until January 1, 2015 so all parties would have adequate time to understand and prepare for the new rule.

In closing, I want to again thank all the witnesses for coming today to discuss the Department of Labor's finalized rule. I look forward to hearing their testimony.

Thank you, Mr. Chairman.

---

Chairman WALBERG. I thank the gentleman.

Pursuant to Committee Rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record.

Without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official record.

It is now my pleasure to introduce our distinguished panel of witnesses. First Ms. Lucy Andrews is vice chair of the National Association for Home Care and Hospice in Washington, D.C.

Welcome.

Mr. Joseph Bensmihen—did I get that right—is the president and chief executive officer of United Elder Care Services in Boca Raton, Florida, and probably missing some of the warmth today.

We are delighted to have two of his children with him today as well.

Thanks for helping your dad making sure that he was here for us.

Our fourth witness, Ms. Karen Kulp is president of Home Care Associates in Philadelphia, Pennsylvania.

Welcome.

And then Mr. Alexander Passantino—did I get that right—I try my best—is a senior counsel at the law firm of Seyfarth Shaw in Washington, D.C.

Before I recognize each of you to provide your testimony, let me briefly explain our lighting system. It is simple. It is like the traffic lights. As long as it is green during the 5-minute period of time, those 4 minutes, it will be green. When it turns yellow, you have 1 minute to get through before you go through some type of orange light at the end.

We won't be extremely strict with the 5 minutes, but try to wrap up as soon as possible when you see that red light.

After that, each of our committee members will have an opportunity to ask you a 5-minute question period, and we will try to keep ourselves to a 5-minute schedule on that.

Having said that, I now recognize Ms. Andrews for your testimony.

**STATEMENT OF LUCY ANDREWS, VICE CHAIR,  
NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE**

Ms. ANDREWS. Good morning, Chairman Walberg, Ranking Member Courtney, and members of the subcommittee on worker protections.

My name is Lucy Andrews. I am the vice chair of the National Association for Home Care and Hospice Board of Directors.

I am a registered nurse and the owner of a small home care company in California that has been providing care to the elderly and disabled for over 10 years.

My company provides care on a private pay basis, as well as under the state Medicaid program and through the Veteran's Administration. Thank you for the opportunity to testify here today.

The subject of this hearing today is of crucial importance to the provision of home care for our nation's elderly and people with disabilities. U.S. Department of Labor has issued a final rule that dramatically changes longstanding overtime compensation exemptions that would effectively eliminate the application of the exemption for home care services.

Based on the experience in states already requiring overtime compensation, we believe the rule will trigger moderate to significant increases in care costs, restriction in overtime hours to the detriment of the workers' overall compensation, loss of service quality and continuity, and finally increased costs passed on to the patient and the public programs such as Medicaid that would decrease service utilization, increase unregulated grey market care purchases, and increase institutional care utilization.

So what does this mean for the workers and the seniors and disabled we care for? Most personal care services to the elderly and disabled are financed out of pocket by the client or their families along with various government programs such as Medicaid. Our clients are not wealthy, many live on incomes that are fixed and limited.

They purchase care as a way of staying out of costly nursing homes and to maintain the greatest degree of independence. The government programs also are not an endless source of financing. Medicaid spending is taxing all state budgets. More often than not, provider payment rates are going down rather than increasing as costs rise.

In my own company, this new rule will force me to make some very hard decisions in order to continue providing care. My employees are currently paid between \$12 and \$14 an hour. We have never paid just minimum wage.

With the requirement for overtime compensation, I will either need to restrict their working hours or increase the charges to my clients. If I restrict the employees' working hours, they will be paid less than what they get paid today.

For example, a client who has 10 hours of care a day will either have to pay the overtime or have two caregivers divide that 10 hour shift. This decreases the hours each employee works and decreases the continuity of care which is so important to the clients.

Our industry is already struggling with high turnover rates, and a cut in pay would put us at the bottom of the list of desirable work. Ultimately it impacts access to care that the increasing number of baby boomers and disabled community rely on to stay at home.

A recent study by Aaron Marcum of Home Care Pulse shows that 54 percent of agencies surveyed already feel the effects of caregiver shortages, resulting in an inability to meet the growing demand for service. As this new rule forces the company to use more staff per client, hiring and training qualified caregivers becomes an even larger issue.

The predictable adverse consequence of the new overtime rules are bad enough. However, coupled with the upcoming ACA employer mandates in 2015, we will be in the middle of the perfect storm.

The Department of Labor's new rule while likely well-intentioned was issued without real appreciation or understanding of the homecare industry. We may be a business that is growing with increased populations of seniors, but we are not a normal business. Our clients are the most vulnerable citizens we have in the country, many supported through frail entitlement programs.

So what should be done? The best thing would be to rescind the new rule and start over with an approach that respects the people and the workers. Ultimately, the administration and Congress must find a way to fund this mandate.

Programs such as Medicaid must respond with payment changes. For private pay clients, we recommend a tax credit that reflects the fact that individuals with limited income use their own resources to stay at home rather than moving into nursing homes that will eventually be paid for by Medicaid.

Thank you again for the opportunity to testify.

[The statement of Ms. Andrews follows:]

**Prepared Statement of Lucy Andrews, Vice Chair,  
National Association for Home Care & Hospice**

Good morning Chairman Walberg, Ranking Member Courtney, and members of the Subcommittee on Worker Protections. My name is Lucy Andrews, Vice Chair of the Board of Directors of the National Association for Home Care & Hospice. I am a Registered Nurse and the owner of a small home care business in California that has been providing care to the elderly and disabled for over ten years. My company provides care on a private pay basis as well as under the state Medicaid program and through the Veteran's Administration. Thank you for the opportunity to testify at today's hearing.

The subject of today's hearing is of crucial importance to the provision of home care to our nation's elderly and people with disabilities. The U.S. Department of Labor has issued a Final Rule that dramatically changes longstanding overtime compensation exemptions that would effectively eliminate the application of the exemptions for home care services. Specifically, the rule redefines "companionship services" to limit the application of the exemption to primarily "fellowship." "Fellowship" is not care and does little or nothing to keep people out of nursing homes or higher acuity facilities.

Also, the rule eliminates any application of the companionship services and live-in exemptions where the worker is employed by a third party. There has been no change in the law mandating these revisions. Further, these new rules change standards that have been in effect for nearly 40 years.

Based on our experiences in states that previously have required overtime compensation to personal care workers, we believe that the rule will trigger the following:

1. Moderate to significant increases in care costs
2. Restrictions in overtime hours to the detriment of the workers' overall compensation
3. Loss of service quality and continuity
4. Increased costs passed on to the patients and public programs such as Medicaid that would decrease service utilization, increase unregulated "grey market" care purchases, and increase institutional care utilization rather than absorbing and covering the higher cost of care.

So what does this mean for the workers and the seniors and disabled we care for?

Most personal care services to the elderly and infirm are financed out of pocket by the clients or their families along with various government programs such as Medicaid. Our clients are not wealthy, many living on limited, fixed incomes. They are purchasing care as a way of staying out of costly nursing homes and to maintain the greatest degree of independence that they can. The government programs are also not an endless source of financing. Medicaid spending is taxing all state budgets. More often than not, provider payment rates are going down rather than increasing as costs rise.

In my own company, this new rule will force me to make some very hard decisions in order to continue care. My employees that provide the care currently are paid between \$12 and \$14 per hour. With the requirement for overtime compensation, I will either need to restrict their working hours or increase my charges to my clients.

If I raise the charges to my clients, I know that most will then limit the amount of care they purchase even if it is to a level less than needed. For clients on fixed incomes, the cost of increasing care will be too much for them to carry and they will look to other options, going with less care or using the underground market that, at best, leaves them with a stranger caring for them without the protections a third party employer offers. By default, the consumer will become the employer of record with all of the employer responsibilities and risks.

If I restrict the employees' working hours, they will be paid less than they get today. For example, a client who has 10 hours of care a day will either have to pay the overtime or have two caregivers dividing the 10 hours into two shifts. This decreases the hours each employee works and decreases the continuity of care clients are used to when paying privately for care services.

Another option is that I reduce the employees' base hourly wage to accommodate overtime costs. Either approach will likely lead to higher turnover in my caregiving staff, increasing my costs of recruitment and training of new employees. Our industry is already struggling with high turnover rates and a cut in pay puts us at the bottom of the list of desirable work. Ultimately, it impacts access to the care that the increasing numbers of Baby Boomers and the disabled community rely on to stay at home.

These problems that are triggered by the new rules speaks to the caregivers I already employ. Across the country, the demand for caregivers increases every day. A recent study by Aaron Marcum of Home Care Pulse shows that 54% of agency's surveyed already feel the effects of caregiver shortages (600 providers participated in the study completed in 2012) resulting the inability to meet a growing demand for services. As this new rule forces companies to use more staff per client, hiring and training qualified caregivers becomes an even larger issue. Compounding the existing worker shortages is the study's finding that one of the biggest threats to losing a caregiver employee was a decrease in their work hours.

The predictable, adverse consequences of the new overtime rule are bad enough. However, when coupled with upcoming ACA employer mandates in 2015, we will be in the middle of the "perfect storm."

With respect to live-in services, the new rule effectively closes that as a business. If my business must pay overtime to live-in workers, but a consumer does not as under the new rule, consumers will go the Craig's List or classified ads to hire someone who has not been trained and is not subject to the supervision we offer. Daily we see the effects of this grey market—the increases in abuses, lack of supervision and lost revenues to the state and federal government in unreported wages and taxes.

We are aware of allegations that home care companies have high profits and can afford to pay higher wages and overtime compensation. There is simply no truth to that claim. My annual margins range between zero and 9%. That is the bare minimum for working capital in order to meet payroll on a timely basis, address new regulatory costs that surface frequently, and to modernize with technologies that help bring higher quality care and efficiency.

The Department of Labor new rule, while likely well intentioned, was issued without any real appreciation or understanding of home care. We may be a business that is growing with the increasing population of seniors, but we are not a normal business as our clients are the most vulnerable citizens we have in this country, many supported through fragile entitlement programs.

What should be done?

The best thing that would be to rescind the new rules and start all over with an approach that respects the people under our care and recognizes that public-financed health care programs pay for most of the services they receive. Alternatively, the Administration and the Congress must find a way to fund this new mandate. Programs such as Medicaid must respond with payment rate changes that cover the cost of overtime. For private pay clients, we recommend a subsidy or tax credit that reflects the fact that individuals with limited income are using their own resources to stay at home rather than moving into a nursing home that may eventually be paid for by Medicaid. Without these changes, access to care it at risk along with the higher costs of institutional care.

Thank you again for the opportunity to testify at this important hearing.

---

Chairman WALBERG. Ms. Andrews, I appreciate that. I appreciate your attention to time as well.

Mr. Bensmihen?

**STATEMENT OF JOSEPH BENSMIHEN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNITED ELDER CARE SERVICES, INC.**

Mr. BENSMIHEN. Chairman Walberg, Ranking Member Courtney, and members of the subcommittee—

Chairman WALBERG. You might want to pull your mic down a little closer. Pull it down a bit, yes.

Mr. BENSMIHEN. There we go. How is that? Okay.

Chairman WALBERG. That is great.

Mr. BENSMIHEN. Chairman Walberg, Ranking Member Courtney, and Members of the Subcommittee, thank you for the opportunity to testify today on the far-reaching and adverse consequences that will result from the implementation of final regulations the U.S. Department of Labor recently issued that modify the companionship exemption under the Fair Labor Standards Act.

My name is Joseph Bensmihen, and I have been President and CEO of United Elder Care Services, Inc., a licensed nurse registry operating in the State of Florida since the year 2000.

I am somewhat unique in this regard in that I not only operate a referral service that facilitates the delivery of in-home care services, I personally, personally need assistance with activities of daily living commonly referred to in our industry as ADLs. Thus, every day I personally experience what it is like to need this type of assistance.

I am not alone in this regard, however. There are also current and former members of Congress who need personal care workers to be able to be productive members of society each and every day.

The final regulations do not take into consideration the impact these rules will have on those of us who actually rely on caregivers to be able to function day-to-day as productive citizens.

Inherent in these arrangements is a need for more than 40 hours of care per week. The final regulations will cause these individuals to either start paying substantially more for the care they need, or learn to live with multiple caregivers to avoid an overtime liability that few can afford.

These are not attractive options. A principal justification for the final regulation is that caregivers deserve overtime. The problem is that this change will not result in caregivers receiving overtime. I say this because currently my clients tell me they can't—they have a hard time paying for the current costs of home care.

The most likely alternative for most of my clients aside from moving into a facility will be to rotate caregivers to ensure that no caregiver works more than 40 hours in any given week.

This means that one of the most cherished benefits of home care among the elderly, disabled, and infirm, namely continuity of care, will be lost. The final regulations will create a new aspect of life that defines—that differentiates between the very wealthy and everybody else.

The vulnerable individuals who happen not to be very wealthy will be subject to never ending trauma as caregivers constantly rotate in and out of their homes.

This is not a very attractive outcome for caregivers either. The caregivers who are registered with my business tell me that they would prefer to remain with only one client during the week. The prospect of having to move from client to client in order for their clients to avoid having to pay overtime is not attractive to them either.

Chairman Walberg, the irony is that the current law protects caregivers and caregivers are entitled to overtime. They are entitled to overtime in every setting with the exception of a person's personal home. That makes sense because in the new regulation there is no government program that will pay for the overtime.

The caregivers who ostensibly are the intended beneficiaries under the final regulations will be worse off. Not only will they not receive the overtime that they might be expecting, they will find their lives thrown into turmoil by having to pack up and move from client to client during the week.

Some might argue that the new rules do not completely eliminate the companionship exemption for the families because the new rules only eliminate the exemption relative to third-party employers. This viewpoint is mistaken.

The definition of companionship services under the final regulation is best counterintuitive. As was mentioned by the chairman, only 20 percent can go to actual care.

That would be like saying to someone I am going to give you a program for the delivery of food for people who can't afford to pay for food, but you are really going to do a program for tablecloths, spoons, and only 20 percent of it can actually be food.

Since 1974, the companionship exemption has operated to enable those of us who need many hours of assistance each week in order to be productive members of society to afford that assistance.

The final regulations effectively repeal that protection. As I understand the separation of powers under the United States Constitution, the decision to repeal the companionship exemption is a decision to be made by the United States Congress.

I strongly urge this Congress to consider legislation that will restore the companionship exemption it enacted in 1974 but this time with the explicit statutory language that will better protect the exemption against an administrative repeal.

Once again, thank you very much for the privilege to testify this morning, and I would be pleased to answer any questions you may have.

[The statement of Mr. Bensmihen follows:]

**Prepared Statement of Joseph Bensmihen, President and CEO,  
United Elder Care Services, Inc.**

Chairman Walberg, Ranking Member Courtney and Members of the Subcommittee, thank you for the opportunity to testify today on the far-reaching—and adverse—consequences that will result from the implementation of final regulations (“the “Final Regulations”) the U.S. Department of Labor recently issued that modify the companionship exemption<sup>1</sup> under the Fair Labor Standards Act (“FLSA”).<sup>2</sup> My name is Joseph Bensmihen and I am President and CEO of United Elder Care, Inc. a licensed nurse registry<sup>3</sup> operating in the State of Florida.

I have been the President and CEO of a caregiver referral service since 2000. I am somewhat unique in this regard in that I not only operate a referral service that facilitates the delivery of home-care services, I personally need assistance with Activities of Daily Living, commonly referred to in the industry as ADL’s. Thus, every day, I personally experience what it is like to need this type of assistance.

I am not alone in this regard, however. There also are current and former Members of Congress who need personal care workers to be able to work and be productive members of society.

The Final Regulations do not take into consideration the impact these rules will have on those of us who actually rely on caregivers to be able to function day-to-day as productive citizens. Inherent in these arrangements is a need for more than 40 hours of care per week. The Final Regulations will cause these individuals to either start paying substantially more for the care they need, or learn to live with multiple caregivers to avoid an overtime liability that few can afford. These are not attractive options.

*I. The DOL’s Final Regulations Will Not Result in Home-Care Providers Receiving Overtime*

A principal justification for the Final Regulations is that caregivers deserve overtime. The problem is that this change will not result in caregivers receiving overtime. I say this because my clients tell me they cannot afford to pay overtime.

Furthermore, based on my personal experience and my experience in the home-care industry, I have found that the individuals who require help at home to maximize their independence—whether disabled or elderly—most often live on a fixed income. Example: Mrs. Jones is being discharged from the hospital and she is warned by her physician, “Mrs. Jones, this is your third fall, one more fall and you will need to go into an ALF<sup>4</sup> or a nursing home unless you get additional home care.” The

<sup>1</sup> 29 U.S.C. §213(a)(15).

<sup>2</sup> Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60454 (Oct. 1, 2013) (to be codified at 29 CFR Part 552).

<sup>3</sup> Chapter 400 of the Florida Statutes Annotated (“FSA”), section 400.462(15), defines a nurse registry as:

Any person that procures, offers, promises, or attempts to secure health-care-related contracts for registered nurses, licensed practical nurses, certified nursing assistants, home health aides, companions, or homemakers, who are compensated by fees as independent contractors, including, but not limited to, contracts for the provision of services to patients and contracts to provide private duty or staffing services to health care facilities licensed under chapter 395 or this chapter or other business entities. (Emphasis added).

<sup>4</sup> Assisted Living Facility.

doctor doesn't say, "I'm going to pay for it." And, in most cases, Medicare doesn't cover the cost of this type of care. The cost of the care will be an out-of-pocket expense for Mrs. Jones. For most of my clients, this is a very large expense for the family. To expect these individuals to start paying time and a half for hours worked in excess of 40 each week is not realistic.

Similarly, when a loved one is receiving care at home and experiences a change in condition, which requires the consumer to be hospitalized—where the companionship exemption does not apply—family members currently say "No" to paying time and a half in facilities. In this context, the need for caregivers to work more than 40 hours per week is entirely discretionary, because the family knows that their loved one will be having their needs met by the facility's own staff. That situation cannot be compared to when a patient is at home. The only help a consumer has while at home is the help that the consumer hires. If consumers do not have the help they need, they will fall and they're going to get hurt. And, they will return to the hospital.

In our business, approximately 60% of clients pay for their home care with long-term insurance; approximately 40% pay with their own private funds; and less than one percent pay for their home care with Medicaid funding or some other government program.

Long-term insurance benefits generally consist of a capped payment per day or week. This benefit will not automatically increase to accommodate the new overtime requirement. These clients will have difficult decisions to make when the new rules go into effect.

Those who pay with private funds are in a similar situation. Many of these clients are struggling to pay for their home care under current law. When the overtime requirement becomes effective, they, too, will need to make tough choices.

Finally, those who receive government-funded benefits might be most severely affected, because those benefits already pay at a below-market rate. These reimbursement rates include no cushion to absorb overtime.

Under all of these payment sources, the prospects of a caregiver being paid overtime for hours worked in excess of 40 per week are very low. The fact is that there is no money to pay the overtime.

## *II. The Final Regulations Will Make Continuity of Care a Luxury only Few Can Afford*

The most likely alternative for most of my clients, aside from moving into a facility, will be to rotate caregivers, to ensure that no caregiver works more than 40 hours in any given week. This means that one of the most cherished benefits of home care among the elderly and the disabled—namely, continuity of care—will be lost. Under the Final Regulations, continuity of care will become a luxury item that only the very wealthy can afford.

In this regard, consumers with Alzheimer's or dementia will be especially harmed. In a typical case, the patient is resistant to having someone new in the house to care for him or her. Ultimately, the family members will be able to convince the individual to accept help. We have multiple clients like this. We have been able to match these individuals with the perfect caregiver and they have bonded and established a relationship that the individual can accept. Under the Final Regulations, this relationship will be destroyed. Once the Final Regulations go into effect, every three days the patient will need to work with a different caregiver, in order for the family to avoid paying time and a half. For the patient, this will be traumatic. The introduction of new caregivers to these individuals is extremely difficult—for both the individual and the caregiver.

The companionship exemption in its current form eliminates this dilemma by enabling individuals of all income levels to enjoy continuity of care, by permitting the same caregiver to remain for an entire week without triggering an overtime liability. The Final Regulations will create a new aspect of life that differentiates between the very wealthy and everyone else. The vulnerable individuals who do not happen to be very wealthy will be subjected to never-ending trauma, as caregivers constantly rotate in and out of their lives.

## *III. Home-Care Providers Will be Adversely Affected by the Final Regulations*

This is not a very good outcome for caregivers, either. The caregivers who are registered with my business tell me that they would prefer to remain with only one client during a week. The prospect of having to move from client to client, in order for their clients to avoid having to pay overtime, is not very attractive to them.

The caregivers who ostensibly are the intended beneficiaries under the Final Regulations will be worse off. Not only will they not receive the overtime they are ex-

pecting, they will find their lives thrown into turmoil, by having to pack up and move from client to client during the week.

Furthermore, because third-party employers will also try to avoid their overtime exposure, caregivers will need to obtain relationships with multiple third-party employers if they want to work more than 40 hours per week. And, caregivers might well find it difficult to obtain work opportunities that are available at the specific hours that they are available to work. For example, if a caregiver whose twelve-hour shifts for a client are cut in half, so the caregiver works for the client six hours per day Monday through Friday, the caregiver will need to find another client that needs weekend hours only; or that needs six-hour shifts Monday through Friday that do not conflict with the six-hour shifts the caregiver is currently working.

Based on my experience, I believe this will be a significant challenge to caregivers. I believe the more likely outcome is that caregivers will work fewer hours delivering home care than they currently work. The net impact on caregivers will be lower overall earnings from home care. We might see caregivers picking up the additional hours they need by working at jobs outside of home care.

#### *IV. The New Definition of Companionship Services Conflicts with the Statutory Definition*

Some might argue that the new rules do not completely eliminate the companionship exemption for the family, because the new rules only eliminate the exemption relative to third-party employers. The details of the Final Regulations make clear that this viewpoint is mistaken.

The new definition of companionship services restricts the amount of “care” an individual can receive to no more than 20 percent of the total hours worked per person and per workweek. This is tragic. To my knowledge, none of my clients currently receive a type of home care that would meet this new definition.

The new definition of companionship services under the Final Regulations is at best counterintuitive. The FLSA defines the class of individuals who are eligible for the exemption as those “individuals who (because of age or infirmity) are unable to care for themselves.” The principal delimiting characteristic of this class of covered individuals is that they are unable to “care” for themselves. It seems incomprehensible that the Final Regulations would treat “care” as something that a caregiver cannot provide, except for a *de minimis* percentage. This is analogous to a program designed to feed the hungry, which defines the covered class as those who are unable to obtain food for their family, and then defines the benefit provided to these families as dishes, silverware and tablecloths, but no more than 20% food!

The practical implication of this revised definition is to deny the companionship exemption in virtually all cases, regardless of whether a third-party employer is involved.

#### *V. Final Regulations Create Unique Problem for Caregiver Registries*

Finally, because I operate a caregiver registry, I need to explain how the new rules create a unique problem for the type of business I operate. As previously noted, I operate a licensed nurse registry in the State of Florida. My business refers self-employed caregivers to families that seek home care. This type of business facilitates what is known in the industry as “consumer-directed care,” where the consumer self-manages the consumer’s own home-care arrangement.<sup>5</sup>

As a registry, my business conducts a rigorous background screen and credential verification for each caregiver, before adding the caregiver to our registry. We then inform the caregivers who pass our vetting process about client opportunities—which they can accept or decline at their discretion. The clients determine the number of hours a caregiver will work for the client and the amount the client will pay the caregiver for that work.

The unique problem the Final Regulations create for my segment of the home-care industry is that a caregiver registry could be determined to be an employer or a joint employer, for purposes of the FLSA, of the caregivers it refers to clients. Because a registry has no ability to control the number of hours a caregiver works for a client—or for multiple clients—or the amount that is paid to a caregiver, a registry faces an existential financial risk under the FLSA with no meaningful ability to manage the risk. This is because a caregiver registry cannot limit the number of hours a caregiver will work or require the payment of overtime.

---

<sup>5</sup> This model of home care, as well as the other home-care model, called the “agency directed care” model is described in detail in the following article written by university professors. Benjamin, Mathias and Franke, *Comparing Consumer-directed and Agency Models for Providing Supportive Services at Home*, Vol. 35 Part II, *Health Services Research* No. 1 Selected Papers From the Association for Health Services Research Annual Meeting (April 2000) at 351, et seq.

While the Preamble to the Final Regulations<sup>6</sup> contains an example that appears intended to clarify the circumstances in which a caregiver registry would not be considered a “third-party employer” of a caregiver, the conclusion given by the example is that under the stated facts the registry is “likely not” the employer of the caregiver. The example is helpful, but it does not provide the degree of certainty that my industry needs.

What my industry needs is clear guidance on how a registry can operate with confidence that it is not an employer or joint employer of a caregiver it refers.

#### *VI. Caregivers Have Access to Overtime Under Current Law*

A little-discussed fact under current law is that caregivers are already entitled to overtime, at time and a half, for hours worked in excess of 40 during a week. They can obtain this entitlement by working anywhere other than in a care recipient’s home. Examples include working in a hospital, nursing home or any other type of facility. This is because the companionship exemption only applies to caregivers who provide their home-care services in the care recipient’s home. Under current law, caregivers have a clear choice. If the caregiver wants overtime, the caregiver need only work at a location other than the care recipient’s home.

The effect of the Final Regulations is to dramatically change a delicate balance that the U.S. Congress struck when it enacted the companionship exemption. When balancing the needs of the vulnerable care-recipient population, consisting of those who because of advanced age or disability are unable to care for themselves, against the needs of able-bodied caregivers to earn overtime, the Congress protected the vulnerable individuals. But the Congress also granted caregivers the right to overtime pay in all other contexts. The Final Regulations effectively repeal the companionship exemption and strip away the overtime and minimum-wage protections that the Congress enacted for these vulnerable individuals.

#### *VII. Conclusion*

I am fortunate I was born with a disability. I am not an individual who was born able bodied and then became disabled. When people who have been able bodied their entire lives begin to decline due to age, infirmity or disability, they tend to hold on to their pride and the notion that “I can do it myself.” In aging, the attitude becomes more so because aging is viewed by some as a “sign of weakness.” Another scenario is you are a healthy husband and father in your early 30’s who becomes disabled due to a car accident. Everyday able bodied individuals join the disabled club. Successful actor, Michael J. Fox, pointedly admits in his book “Always Looking Up” he never gave it a second thought how hard it is for those of us who have a debilitating illness to get dressed in the morning or have the use of limited motor skills. Without human help we cannot maximize our independence.

Since 1974, the companionship exemption has operated to enable those of us who need many hours of assistance each week, in order to be productive members of society, to afford that assistance. The Final Regulations effectively repeal that protection. As I understand the separation of powers under the U.S. Constitution, the decision to repeal the companionship exemption is a decision to be made by the U.S. Congress. I urge the Congress to consider legislation that will restore the companionship exemption it enacted in 1974—but this time with explicit statutory language that will better protect the exemption against an administrative repeal.

---

Chairman WALBERG. Thank you, Mr. Bensmihen.

Ms. Kulp, welcome.

#### **STATEMENT OF KAREN KULP, PRESIDENT, HOME CARE ASSOCIATES**

Ms. KULP. Thank you. Good morning. Is this good?

Chairman WALBERG. That is great.

Ms. KULP. Good morning, Chairman Walberg, Ranking Member Courtney, and members of the subcommittee. Thank you for the opportunity to testify today in support of the new rule to extend minimum wage and overtime protection to home care workers. I am happy to be here with my colleagues because all of us do similar work, which is extremely important.

---

<sup>6</sup>Id. at pp. 60484—485.

My name is Karen Kulp. I am president and CEO of Home Care Associates based in Philadelphia, Pennsylvania. Our company celebrated our 20th anniversary this year. We employ 206 home care workers, 90 percent of whom work full-time.

We care for about 250 consumers per day. About 90 percent of our revenue is from Medicaid, and about 70 percent of our consumers are younger people who are disabled and under 65.

Nationwide, an estimated 27 million Americans will depend on our system of long-term care by 2050. Increasingly, these individuals prefer to receive care in their homes and communities.

To ensure quality care in home-based settings, federal policies must support the development of a stable, skilled home care workforce. Implementation of minimum wage and overtime protections for homecare workers is an essential step toward reaching the goal.

Home care is skilled work. It is hard and messy and physically challenging. At HCA, we call it "heart work" because we believe that the capacity to excel in this work starts with a big heart but also includes a set of skills that require training and practice.

The workforce, which is 90 percent female, assists elders and people with disabilities with personal care needs like dressing, bathing, going to the bathroom, eating, and mobility; services which are far more crucial and require far more skill than providing simple companionship.

The work is vital to our communities and families, but poor wages averaging less than \$10 an hour make recruitment and retention for these positions difficult.

Inadequate compensation contributes to high turnover rates, undermining quality of care, and jeopardizing access to needed services in the face of growing demand. That demand has made home health aides and personal care aides our nation's fastest growing jobs.

At Home Care Associates, we have chosen a little bit of a different approach. We invest in quality jobs in order to provide quality care. We meet our state's mandated minimum wage and overtime protections, provide quality training, and offer full-time employment which is highly unusual in our industry where more than half of health aides work part-time.

Our investments have paid off. We have a workforce whose average length of employment is nearly 3 years in an industry where three-quarters of the workers have been employed less than 12 months.

Our consumers appreciate the quality and continuity of the care we provide as a result of this stability, and we are profitable even with the majority of our revenue coming from Medicaid.

Industrywide, rates of overtime for homecare workers are relatively low; less than 10 percent report working more than 40 hours. At HCA, about 14 percent of our consumers receive over 50 hours of care per week, and 10 percent receive over 60 hours.

We manage our overtime costs by establishing a care team for these high need consumers. We begin by identifying two or three aides with whom the consumer is comfortable that way we can ensure that the consumer always has assistance from someone she knows. In the event of the absence of one worker, the consumer will always be covered.

Moreover, a team approach guarantees that workers are not overtired and stressed out, reducing burnout and rates of injury for consumers and workers. It is a win-win-win. Workers and consumers are better served, overtime costs are low, and HCA has a healthier and more stable workforce.

Revenue for the homecare industry, which reached \$93 billion last year, grew at an average rate of 8 percent per year from 2001 to 2011 despite the recession. This thriving industry can afford to pay homecare workers minimum wage and overtime as demonstrated by the 15 states that already provide these basic labor protections.

Michigan is a case in point. A similar state regulation was implemented in 2006. Notably, Michigan's healthcare sector grew more quickly in the 5 years following the change than in the 5 years before.

In our business, rising worker compensation costs, higher gas prices, and reimbursement rates that have not kept up with the cost of living are a far greater threat to profitability than paying minimum wage and overtime.

The new rule recognizes professionalization of this workforce and the skills these jobs now require. After many decades the rule will at long last give homecare workers the same rights as other American workers.

It is an important first step toward assuring that the American people get what they need and want; a stable, competent workforce to allow elders and people of people living with disabilities to remain at home and to live independently and with dignity.

Thank you.

[The statement of Ms. Kulp follows:]

**Prepared Statement of Karen Kulp, President and CEO,  
Home Care Associates**

CHAIRMAN WAHLBERG, RANKING MEMBER COURTNEY, AND MEMBERS OF THE SUB-COMMITTEE: Thank you for the opportunity to testify today in support of the new rule to extend minimum wage and overtime protection to home care workers nationwide. My name is Karen Kulp. I am President and CEO of Home Care Associates based in Philadelphia. Our company celebrated our 20th anniversary this year. HCA employees 206 home care workers 90% of whom work full time. Our company cares for about 250 consumers each day. About 90% our revenue is from Medicaid, about 70% of our consumers are people with disabilities under age 65.

As the CEO of a small home care agency, I believe implementation of minimum wage and overtime protections for home care workers is essential for quality home care. First, as a nation, we must improve working conditions for home care workers in order to meet our nation's increasing home care needs and avoid a caregiving crisis. The new rule is an important step in improving conditions and stabilizing this workforce. Home care workers provide the vital care that allows older adults and persons with disabilities needing care to remain in their own homes. An estimated 27 million Americans will depend on our system of long-term services and supports by 2050. Many working Americans rely on home care workers' assistance in order to continue pursuing our careers and supporting our own families.

*The Workforce*

Almost ninety percent of home care workers are women, and because of poverty-level wages and few benefits, nearly half have to rely on public assistance such as Medicaid and food stamps to make ends meet.<sup>i</sup> Inadequate compensation makes recruitment for these positions difficult and contributes to high rates of turnover, undermining quality of care and jeopardizing access to needed services in the face of growing demand.<sup>ii</sup> Meanwhile, growing demand has made home care one of the top five fastest-growing jobs in the country. Reports show that the direct-care workforce

is projected to be the nation's largest occupational grouping by 2020—that's less than seven years away.<sup>iii</sup> The urgency is real.

Home care is skilled work. It is hard, messy and often physical work. Home care workers assist elders and people with disabilities with personal care needs like dressing, bathing, going to the bathroom, eating, and mobility—services which are far more crucial and require far more skill than providing simple companionship.

The new rule recognizes the professionalization of this workforce and the skills these jobs now require and that employers and customers demand. After many decades of discussion and deliberation, the rule will, at long last, give home care workers the same rights as other American workers. It is an important first step toward ensuring that the American people get what they need and want—a stable competent workforce to allow elders and people living with disabilities to remain at home and to live independently and with dignity.

#### *The Industry*

The home care industry, made up of over 80,000 agencies and franchises, is no longer a cottage industry made up of small mom-and-pop agencies. It is increasingly dominated by large national franchise chains. Though state budgets have tightened since 2008, home care industry revenues have continued to show solid growth.

Revenue for the home care industry grew at an average rate of 8 percent per year from 2001 to 2011. In 2011, the combined revenues of the two key industries providing home care and personal assistance totaled nearly \$93 billion!<sup>iv</sup>

Since Pennsylvania is one of 15 states that already mandates minimum-wage and overtime protections for home-care workers, I know firsthand that a successful home-care business can pay workers above minimum wage and comply with overtime protections and be profitable. I am keenly aware of the costs involved in running a successful home care business. In our business, rising worker compensation costs, higher gas prices and reimbursement rates that have not kept up with the cost of living are a far greater threat to profitability than paying minimum wage and overtime. HCA is proof that this thriving industry can afford to pay home care workers minimum wage and overtime. It's a matter of simple fairness.

In Michigan, where minimum wage and overtime protections have been offered to home care aides since 2006, the home care sector has grown at a faster rate since extending these protections than in the same time period before. An analysis of the number of home care establishments within Michigan shows the dramatic growth of the industry following the state's implementation of the new minimum wage and overtime rules. In fact, growth in Michigan's home care business establishments was actually higher in the period after implementing wage and hour protections than before—41 percent compared to 32 percent.<sup>v</sup> Furthermore, because 15 states, like Michigan and my state of Pennsylvania, already offer minimum wage and overtime compensation to home care workers, we know that the rule can be implemented without disruption to care.<sup>vi</sup> Paying overtime can improve the quality of care for the consumer and the quality of the job for the worker.

If an employer is not required to pay overtime, there is no incentive to give a home care worker a schedule that allows for time off. Working 60 to 80 hours per week is not a good practice for the consumer or the aide. The stress of working that many hours can affect the health of the worker leading to injuries, which the company ultimately pays for in increased worker's compensation costs and high turnover which means more costs for training and recruitment. It is also not a smart practice to have only one person who is able to take care of a consumer. Suppose that person gets sick or has an emergency? Does that mean that the consumer goes without care that day?

At HCA about 14% of our consumers receive over 50 hours of care per week, and 10% receive over 60 hours a week. Before starting these cases we identifying two or three aides with whom the consumer is comfortable. That way we can assure that the consumer always has coverage by someone she knows. In the event of an emergency by one worker, the consumer always will be covered.

Excessive overtime is not good for the consumer either. An aide who is tired and stressed can make mistakes and jeopardize the well-being of the consumer. Recently at HCA, we embarked on a new line of business. We have hired home care workers who, prior to being employed by our company, worked directly for the consumer. In order to participate, consumers and their attendants agreed that each attendant could work only a maximum of 45 hours. Consumers and aides are overwhelmingly positive about the program. Workers feel more supported and consumers are happy to have aides who are fresher and able to be more attentive to their needs.

Like Home Care Associates, many of the country's largest home care employers already pay minimum wage and overtime. Furthermore, nationwide, the incidence

of overtime in this workforce is very low, with less than 10 percent of home care workers reporting working any overtime.<sup>vii,viii</sup>

*The Cost*

The Department of Labor estimates an average annual cost of \$321.8 million of implementing the rule, mostly due to payment of overtime costs.<sup>ix</sup> I'd like to make three points about this figure. First, it is manageable. It is a small fraction of the industry's \$93 billion in annual revenue. Furthermore, as I noted above, overtime can be managed. Finally, let's remember that this modest cost is hardly money down the drain, it's a sorely needed investment of the hardworking women and men of the home care workforce who are caring for our elders and individuals with disabilities.

Many of the arguments being made by those who oppose the revised companionship rule are not based on the facts. For example, opponents claim that the revised rule will result in increased institutionalization. But evidence from the 15 states that already provide minimum wage and overtime protections to their workers solidly demonstrates that there is no correlation between guaranteed wage and hour protections for home care workers and rates of institutionalization.<sup>x</sup> In fact, strengthening the home care workforce is crucial to keeping individuals out of nursing homes. An underpaid, unsupported workforce cannot provide the quality services we need in millions of homes all across our nation.

It takes a special kind of person to do this work day in and out. Workers stay on the job when their work is respected and adequately rewarded. At Home Care Associates, we have a workforce whose average length of employment is nearly three years in an industry in which three-quarters of the workers have been employed less than 12 months. This employment continuity improves the quality of care we provide by allowing aides to develop long-lasting relationships with clients and helps our bottom line by sparing us the costs of recruiting and training new workers.

Extending minimum wage and overtime protection to home care workers today helps meet the underlying policy goals of the Fair Labor Standards Act: improving job quality for low wage workers, promoting greater employment opportunities across the labor force, and stabilizing our nation's economy.

ENDNOTES

<sup>i</sup> PHI State Data Center. <http://www.phinational.org/policy/states>

<sup>ii</sup> Caring in America: A Comprehensive Analysis of the Nation's Fastest-Growing Jobs—Home Health and Personal Care Aides, Section 9, <http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf>

<sup>iii</sup> Ibid, Section 2

<sup>iv</sup> Value the Care #5: Growing Home Care Industry Can Afford Basic Labor Protections for Workers. <http://phinational.org/sites/phinational.org/files/phi-value-the-care-05.pdf>

<sup>v</sup> Data Brief: MI Home Care Industry Before and After Extending Labor Protections to Home Care Workers. <http://phinational.org/sites/phinational.org/files/michigan-labor-protections-and-home-care-industry.pdf>

<sup>vi</sup> Value the Care #8: Extending FLSA to Home Care Aides: Impact on Medicaid-funded Long-Term Services and Supports. <http://phinational.org/sites/phinational.org/files/phi-value-the-care-08.pdf>

<sup>vii</sup> Value the Care #6: Home Care Jobs: The Straight Facts on Hours Worked. <http://phinational.org/sites/phinational.org/files/policy/wp-content/uploads/phi-value-the-care-06.pdf>

<sup>viii</sup> Value the Care #7: High Hour Consumers in the California IHSS Program: Impact of Compensating Overtime Hours. <http://phinational.org/sites/phinational.org/files/phi-value-the-care-07-0.pdf>

<sup>ix</sup> U.S. Department of Labor, Final Rule: "Application of the Fair Labor Standards Act to Domestic Service," <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=27104>

<sup>x</sup> Data Brief: Institutionalization Rates in States that Extend Minimum Wage and Overtime Protection to Home Care Workers. <http://phinational.org/sites/phinational.org/files/research-report/institutionalization-data-brief.pdf>

---

[Additional submissions of Ms. Kulp follow:]

[Ms. Kulp's submissions of various "Value the Care" updates, nos. 5-8, may be accessed at the following Internet addresses:]

*http://phinational.org/sites/phinational.org/files/phi-value-the-care-05.pdf*

*http://phinational.org/sites/phinational.org/files/phi-value-the-care-06.pdf*

*http://phinational.org/sites/phinational.org/files/phi-value-the-care-07.pdf*

*http://phinational.org/sites/phinational.org/files/phi-value-the-care-08.pdf*

---

[Ms. Kulp's submission of the Jan. 2013 data brief may be accessed at the following Internet address:]

*http://phinational.org/sites/phinational.org/files/research-report/institutionalization-data-brief.pdf*

---

[Ms. Kulp's submission of the Mar. 2013 data brief may be accessed at the following Internet address:]

*http://phinational.org/sites/phinational.org/files/michigan-labor-protections-and-home-care-industry.pdf*

---

[Ms. Kulp's submission of an AFSCME letter, dated Nov. 19, 2013, on DOL's companionship rule follows:]



Lee Saunders  
President  
Laura Reyes  
Secretary-Treasurer

Vice Presidents

Ken Allen  
Portland, OR  
Helen L. Bayer  
Chicago, IL  
Kari Delta, RN  
San Dimas, CA  
Greg Devereux  
Olympia, WA  
Dany Donohue  
Albany, NY  
David R. Fillman  
Harrisburg, PA  
Michael Fox  
Harrisburg, PA  
Kathleen Garrison  
Lynn, CT  
Ragbir George, Jr.  
Bronx, NY  
Maggie Harrell  
Williamstown, NJ  
Johanna Puno Hester  
San Diego, CA  
Darryl J. Human  
Des Moines, IA  
Silvatore Luciano  
New Britain, CT  
John A. Lyall  
Washington, OH  
Kathryn Lybarger  
O'Fallon, IL  
Roberta Lynch  
Chicago, IL  
Christopher Mabe  
Westerville, OH  
Glennard S. Middleton Sr.  
Baltimore, MD  
Ralph Miller  
Los Angeles, CA  
Gary Mitchell  
Madison, WI  
Douglas Moore Jr.  
San Diego, CA  
Frank Moretti  
Brentwood, CA  
Henry Nichols  
Philadelphia, PA  
Randy Pereira  
Honolulu, HI  
Greg Powell  
Austin, TX  
Lillian Roberts  
New York, NY  
Eddie Rodriguez  
New York, NY  
Lawrence A. Roehrig  
Lansing, MI  
Joseph P. Ruggola  
Coral Gables, FL  
Eliot Seide  
South St. Paul, MN  
Mary E. Sullivan  
Albany, NY  
Braulio Torres  
San Juan, PR  
David Warrick  
Indianapolis, IN  
Jeanette D. Wynn  
Tallahassee, FL

November 19, 2013

The Honorable Tim Walberg  
Chairman  
Workforce Protections Subcommittee  
Education and the Workforce Committee  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Joe Courtney  
Ranking Member  
Workforce Protections Subcommittee  
Education and the Workforce Committee  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Member Courtney:

On behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees (AFSCME), including approximately 125,000 home care providers, I am writing in support of the recent final rule issued by the U.S. Department of Labor (DOL) concerning the "companionship exemption" under the Fair Labor Standards Act (FLSA).

Home care providers are a lifeline to independence and dignity for the consumers to whom they provide support services. The work is physically demanding and intensely personal in nature, as workers often assist in dressing, toileting and feeding their consumers. The work requires an exceptional emotional connection and is a daily testament to our values of freedom and respect.

Home care workers make a real difference in someone's quality of life every hour they work. It is real work and should be valued as such. Until the recent final DOL rule, the past regulations put home care workers on the same footing as casual babysitters. This status has kept home care workers and their families near poverty. Nearly one out of two home care workers are in households relying on public assistance, such as Medicaid and food stamps, to meet their basic needs.

We applaud President Obama and U.S. Secretary of Labor Perez for standing with home care workers and saying it's time to be fair to those who care. The recent final rule will end a long-standing and grave injustice.

It is not time to turn back the clock and again broadly exempt this workforce and industry. Such a sweeping policy is unsound, unfair, and undermines the economic recovery and our nation's goals for quality long-term care. Extending basic minimum wage and overtime protections to most home care workers will improve the stability of our home care workforce and encourage growth in jobs that cannot be outsourced. Reducing turnover in this workforce will improve access to and quality of, these much-needed services.

The FLSA was enacted in 1938 to fight poverty by raising workers' wages and stimulating economic growth. These goals remain as relevant and urgent today as they were back then. The modest amounts of additional pay these workers receive will be spent locally and help the economy grow.

American Federation of State, County and Municipal Employees, AFL-CIO

TEL (202) 429-1000 FAX (202) 429-1293 TDD (202) 659-0446 WEB [www.afscme.org](http://www.afscme.org) 1625 L Street, NW, Washington, DC 20036-5687

800-521-1212 10/12

The DOL final rule reflects the tens of thousands of public comments the agency received in overwhelming support of providing home care workers with federal wage and hour protections. The final rule moves this workforce and industry into the 21<sup>st</sup> century, but provides ample time for all stakeholders to prepare and plan for implementation. The final rule also deals with the unique situation of family members who are paid home care providers in a sensible and balanced manner.

We strongly oppose efforts to delay or derail the implementation of this final rule. Providing minimum wage and overtime protections for most home care workers is very important, but it is but one component to stabilizing this workforce and addressing the needs of our aging population. We strongly support increasing resources to expand in-home supports and services. Our nation faces many challenges to allow consumers to live with dignity, respect and independence, but the solution to providing these needed services can never be to deny paid caregivers the basic federal minimum wage and overtime protections.

Sincerely,



Charles M. Loveless  
Director of Federal Government Affairs

CML/LB:rf

Chairman WALBERG. Thank you, Ms. Kulp. I appreciate that and the references to Michigan. Let me say—I experienced it very closely with my mother for over a year. And yes, the healthcare is going up, the numbers of us in the aged community are going up as well. The challenges that healthcare workers faced are not—don't share the same positive feelings of people looking in from the outside.

Mr. Passantino, thank you for being here. We look forward to your comments.

**STATEMENT OF ALEXANDER J. PASSANTINO,  
SENIOR COUNSEL, SEYFARTH SHAW, LLP**

Mr. PASSANTINO. Thank you.

Chairman Walberg, Ranking Member Courtney, members of the subcommittee, thank you for the opportunity to participate in today's hearing. I am honored to appear before you today.

My name is Alex Passantino. I am an attorney with the Washington, D.C. office of Seyfarth Shaw. My testimony today is solely my own, and I don't represent my firm, its clients, or any other person or organization.

In my practice I spend about 95 percent of the time on wage and hour issues. I have been working on these issues since I entered private practice in the fall of 1997.

From 2005 to 2009 I served on the leadership team of the Wage and Hour Division and ultimately served as the acting administrator. In 2009, I left Wage and Hour and returned to private practice.

In my testimony today, I will be discussing some of the compliance difficulties likely to face employers—particularly individuals and families—under Department of Labor's newly-issued regula-

tions regarding the application of the FLSA to domestic service employment.

In particular, my testimony will focus on the challenges that American families will face as a result of the Department's recent final rule regarding the companionship services exemption.

As the subcommittee is aware, the FLSA generally requires covered employers to pay nonexempt employees the minimum wage for all hours worked and overtime compensation at a premium rate for hours worked in excess of 40.

In 1974, Congress extended the FLSA's minimum wage and overtime requirements to domestic service employees and at the same time exempted any employee employed in domestic service employment to provide companionship services for individuals who because of age or infirmity are unable to care for themselves.

Jumping straight to the question of domestic service employee coverage and the companionship services exemption however, puts the cart before the horse. The threshold question, as it is in all FLSA matters, is whether the individual performing the work is an employee under the FLSA.

If the worker is not an employee, then neither the minimum wage nor the overtime requirements of the FLSA apply. In other words, only if the individual is an employee does the exemption even need to be considered.

Somewhat curiously for an agency that has been focused on employment relationship neither the rule nor the Wage and Hour Division's guidance documents address this critical issue.

They provide no meaningful assistance to American families on how to determine whether a particular individual is an employee under the FLSA. This is critically important because the department's analysis related to what tasks a companion may or may not perform is premised on a statement in the Congressional record.

It says, "We have another category of people who might have an aged father, an aged mother, an infirm father, and an infirm mother, and a neighbor comes in and sits with them."

The American people already have a name for a neighbor who sits with an aged or infirm parent, that is friend. Yet this is the concept upon which the department's proposal and analysis was premised, that a neighbor who sits with a sick parent ceases to be a friend and has become a regulated entity.

The examples of permissible activities identified by the department in its final rule make clear that friendship is covered by its rulemaking. Watching television, visiting with friends and neighbors, taking walks, playing cards, and engaging in hobbies.

If these are the activities that the department has determined to be exempt then they also believe that that is employment because you only need an exemption if there is employment.

Every day across America these activities are shared between friends none of whom for a moment consider that someone is entitled to compensation. The DOL doesn't address this critical issue. It simply provides no guidance to American families.

Indeed the self-assessment tool on Wage and Hours Web site jumps right into the application of the exemption and never addresses the employment issue. The American families will need to

keep track with precision of the activities performed by these people.

Examples of activities that can result in the loss of exemption include assistance in putting on a coat, assistance in brushing hair, assistance with using the restroom, driving to the recreation center, making a peanut butter and jelly sandwich to be eaten later in the day, and folding a T-shirt. If the aggregate of amount of this time exceeds 1.5 hours out of an 8-hour day, the family loses the exemption.

It is incumbent upon the department to provide more comprehensive guidance to American families who will be struggling to make these decisions. In addition, because the department effectively converts friendship into employment, it likewise should provide guidance on other areas of domestic service such as when people become chauffeurs when they carry their friends' kids around in the car and what types of payments might be considered in determining whether there is an employment relationship.

The burden on American families is further compounded by the department's elimination of the companionship services exemption with respect to third-party employers. Although it maintains the exemption for individuals and families after 40 years or nearly 40 years the department reverses its position and applies it to third-party employers.

Absent a dramatic restructuring of the industry, by January 1, 2015, the overwhelming majority of American families that use these services have to decide whether they are going to continue to use the third-party or whether they are going to directly employ companions.

I am well over my time. I am happy to take your questions.  
[The statement of Mr. Passantino follows:]

**Prepared Statement of Alexander J. Passantino,  
Senior Counsel, Seyfarth Shaw LLP**

CHAIRMAN WALBERG, RANKING MEMBER COURTNEY, AND MEMBERS OF THE SUB-COMMITTEE: Thank you for the opportunity to participate in today's hearing. I am honored to appear before you today.

By way of background, I am an attorney in the Washington, DC office of Seyfarth Shaw LLP. My testimony today is solely my own and I do not represent my firm, its clients, or any other person or organization.

In my practice, I spend approximately 95% of my time on wage and hour issues. The majority of that time is spent counseling employers with respect to issues arising under the Fair Labor Standards Act, the Service Contract Act, the Davis-Bacon and Related Acts, and state laws related to the payment of minimum or prevailing wages and overtime. I have been working on wage and hour issues since entering private practice in the Fall of 1997.

In 2005, I joined the leadership team of the U.S. Department of Labor's Wage & Hour Division (WHD). In 2006, I was appointed Deputy Administrator of WHD and, in 2007, I became the Acting Administrator. President George W. Bush nominated me to serve as the

Administrator in March 2008, but the U.S. Senate never voted on my nomination. I left WHD in 2009 and returned to private practice.

In my testimony today, I will be discussing some of the compliance difficulties likely to face employers—particularly individuals and families—under the Department of Labor's (DOL's or Department's) newly-issued regulations regarding the application of the Fair Labor Standards Act (FLSA) to domestic service employment. In particular, my testimony will focus on the challenges that American families will face as a result of the Department's recent final rule regarding the companionship services exemption.

As the subcommittee is aware, the FLSA generally requires covered employers to pay nonexempt employees a minimum wage for all hours worked and an overtime

premium of one and one-half times an employee's regular rate of pay for all hours worked in excess of 40 hours in a workweek. In most circumstances, the determination of whether an employee is subject to the FLSA involves consideration of whether the employee is "engaged in commerce or in the production of goods for commerce" or whether the employee is "employed in an enterprise engaged in commerce or in the production of goods for commerce."

In 1974, Congress included "domestic services" within the scope of the FLSA's coverage, finding that "the employment of persons in domestic service in households affects commerce," and extending the FLSA's minimum wage and overtime requirements to "domestic service" employees. At the same time, Congress exempted employees providing "companionship services" to the elderly or infirm. The exemption applies to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves \* \* \*." 29 U.S.C. 213(a)(15).

Jumping straight to the question of domestic service employee coverage and the companionship services exemption, however, puts the cart before the horse. The threshold question—as it is in all FLSA matters—is whether the individual performing the work is an "employee" under the FLSA. If the worker is not an "employee," then neither the minimum wage nor overtime requirements of the FLSA would apply. Only if the individual is an employee does an exemption need to be considered.

Somewhat curiously for an agency that has been focused on the issue of employment relationship, neither the rule nor WHD's guidance documents address the critical issue of employment status in this context.<sup>1</sup> WHD provides no meaningful assistance to American families on how to determine whether a particular individual is an "employee" under the FLSA. The determination of whether an individual is an "employee" is critically important because the Department's analysis related to what tasks a "companion" may or may not perform is premised on a statement by Senator Burdick as set forth in the Congressional record and quoted in the preamble to the proposed rule: "We have another category of people who might have an aged father, an aged mother, an infirm father, an infirm mother, and a neighbor comes in and sits with them."

Applying the companionship services exemption in these cases would be extraordinary. The American people already have a name for a neighbor who sits with an aged or infirm parent: "friend." Yet, this is the concept upon which the Department's proposal and analysis was premised: a neighbor who sits with a sick parent ceases to be a friend and has become a regulated entity. The examples of "permissible" activities identified by the Department in its final rule make clear that friendship is covered by its rulemaking: "Examples of activities that fall within fellowship and protection may include: watching television together; visiting with friends and neighbors; taking walks; playing cards, or engaging in hobbies."

These are the activities that the Department has determined to be "exempt"; as I noted previously, however, the exemption is only necessary once there has been a finding of employment. Every day across America the activities described by the Department are shared between friends, none of whom consider for a moment that they may be entitled to compensation as domestic service employees. Yet, notwithstanding the Department's recent focus on attempting to find the existence of an employment relationship in a wide variety of unpaid contexts—including volunteers and interns—DOL does not address this critical, threshold issue. It simply provides no guidance to American families; indeed, the self-assessment tool on WHD's website ("Am I required to pay minimum wage and overtime pay?", found at <http://www.dol.gov/whd/homecare/checklist.htm>) jumps right into the application of the exemption, without a single question designed to assess employment.

It is easy to dismiss this concern with some variation of the statement "Of course the law does not require friends to be paid minimum wage and overtime." DOL, however, provides no guidance at all on how to distinguish when "fellowship and protection" activities are performed by a non-employee and when they are performed by an employee subject to the FLSA.

Similarly, it is easy to dismiss the concern with a statement that these "fellowship and protection" activities are exempt activities. DOL's rule, however, requires that families pay attention to whether a friend has somehow "become" a domestic services employee. Once the individual has crossed that barrier, families will need to track with incredible precision the amount of time their neighbor spends helping with laundry, assisting with dressing, driving to appointments, or cooking meals that may be eaten outside of their presence. This is due to the fact that the exemp-

---

<sup>1</sup> The Department does include a discussion on whether family members or members of the household are employees under the FLSA if they are paid for their services (they are).

tion is lost when the employee spends more than 20% of his or her time providing "care."

Examples of activities that can result in loss of the exemption include:

- assistance in putting on a coat;
- assistance in brushing hair;
- assistance with using the restroom;
- driving to the recreation center;
- making a peanut-butter-and-jelly sandwich to be eaten later in the day; and
- folding a t-shirt.

The Department limits these tasks (and many, many others) to an aggregate amount of 20% of the employee's time—which is just over 1.5 hours of an eight-hour day. It certainly is not difficult to imagine someone spending more than that amount of time on these tasks.

Moreover, in one of its Fact Sheets on these issues, the Department notes that "[h]ousehold work that primarily benefits other members of the household, such as making dinner for the entire family or doing laundry for another member of the household, results in a loss of the exemption, and the employee is entitled to minimum wage and overtime for that workweek."

Given the increased importance of the threshold question of whether someone is an "employee," it is incumbent upon the Department to provide comprehensive guidance to American families who will be struggling to make these decisions. In addition, because the Department is now converting friendship into employment, it likewise should provide guidance on other areas of "domestic service." For example:

- Does the Department believe that a neighbor who sits with someone's family member is an "employee" for the purposes of the FLSA? What factors go into the determination of whether someone is an employee?
- Is remuneration a factor? In which cases should remuneration be considered in the employment analysis? If a companion is included in someone's will as "compensation" for their companionship, is that sufficient "remuneration" to trigger an employment relationship? What if there is simply a promise to be included in a will that was unfulfilled? Or what if the intention of providing the companionship was based on an expectation of some future consideration?
- If a neighbor sitting with a family member is a "companion" subject to the FLSA, does the same analysis apply to a neighbor who drives someone's children to school? Is that person a "chauffer" for FLSA purposes? What factors would go into a determination that your friend has become your chauffeur, and thus, a domestic services employee under the FLSA?
- If a neighbor sitting with a family member is a "companion" subject to the FLSA, if colleagues assist someone with an overhaul of the yard, does that make them "gardeners" for the purposes of the FLSA?
- In each of these assessments, what evidence will the Department rely upon to determine an individual's employment status? Should families begin providing their neighbors with stipulations that the friendship they provide is charitable in nature to protect the family from a future claim under the FLSA and/or investigation by the Department into whether someone's companionship was grounded in friendship or whether it was part of employment?

The examples above logically follow the Department's foundational reliance upon the statement by Sen. Burdick to support its reading of the exemption. If the Department's position is that a neighbor sitting with a sick family member is an employee, then the Department must provide families sufficient regulatory guidance to address the critical issue of employment status. This position will undoubtedly take most—if not all—families considering it by surprise.<sup>2</sup>

The burden on American families is further compounded by the Department's elimination of the companionship services exemption for third-party employers, although it has been retained for individuals and families. After nearly 40 years, the Department reversed its position on this issue in its final rule. According to the Department, under the existing regulations, 98% of employees covered by the companionship exemption were employed by third-party employers. As noted in the government's brief in the U.S. Supreme Court case of *Long Island Care At Home Ltd. v. Coke*, "[i]f the companionship services exemption to the FLSA was narrowed to only

---

<sup>2</sup>The only guidance that remotely addresses the issue is section 6(f) of the FLSA, which limits application of the minimum wage requirements to someone who is employed for more than eight hours in domestic services employment. See 29 USC 206(f). It is not difficult to exceed the eight-hour mark with a dinner and some carpooling (for example, in the weeks in which a mother to a newborn infant gets assistance from her friends); moreover, no ordinary person would ever keep records of the activities of friends to determine whether they in fact exceeded the eight-hour threshold.

those employees hired directly by a family member or the head of household, then the exemption would encompass only 2% of employees providing companionship services in private homes. “

Absent a dramatic restructuring of the industry, with the regulation scheduled to take effect in January 2015, 98% of the employees performing companionship services in private homes will be entitled to overtime compensation. In other words, the overwhelming majority of families who use companionship services must decide, before January 1, 2015, whether to continue using third-party providers (and incurring additional costs due to the overtime premiums that must be paid) or directly employing companions in an effort to eliminate the overtime payment requirements.

The elimination of the third-party exemption is a dramatic change. It had been unchanged for 38 years despite review by the U.S. Supreme Court and numerous amendments to the FLSA by Congress. Although the Department claims that there have been changes in the home care industry in the last 38 years, it identifies no real changes that have taken place since 2007. This is significant because the key reasons for leaving the regulation unchanged were articulated by the Department in connection with the U.S. Supreme Court’s review. In 2007, the Department believed that eliminating the companionship services exemption for third-party employers would cause catastrophic results for the industry and for the American care system. It believed that placing the primary FLSA compliance burden directly on the person receiving care was not in the best interests of employers or employees. Yet, in 2013, its rule does precisely that, creating a financial incentive that will drive companionship services employees to employment directly by American families, who will be largely unfamiliar with the requirements of the FLSA, or any of the many other laws that govern the employment relationship.

Alternatively, cost-conscious citizens may find themselves reliant upon unscrupulous agencies who disregard these laws. Honest third-party employers—with the most capability for ensuring employment standards—may simply be priced out of the market.

It is ironic that at a time when the Department is focused on enterprise-wide enforcement and is spending significant resources attempting to determine how best to defeat “fissured” industries, it has also issued a regulation that potentially fissures the companionship services industry and may inhibit any effort by the Department to conduct enterprise-wide enforcement. If the increased costs associated with third-party employment do, in fact, drive employment of companions to American families directly, the Department will be responsible for creating its own enforcement nightmare: individual-by-individual, family-by-family investigations that necessarily require a detailed analysis of “what happened, when” in the family home.

The Department’s apparent effort to calm the fears of American families by stating that individuals, families, and households may assert the exemption even when they jointly employ the employee with a third-party (which, of course, may not assert the exemption) will have little impact in practical application. In fact, it may actually result in families finding themselves worse off.

The exemption is not available to the third-party employer agencies, and, as a result, they have little incentive to limit the tasks that defeat the exemption; regardless of whether the employee performs the tasks, the third-party agency must meet the minimum wage and overtime requirements. The individual, family, or household, however, will lose their ability to claim the exemption if the prohibited tasks go above 20% of the employee’s time, a condition about which they may not even be aware if they have decided to use a third-party employer agency. Thus, if the primary employer is not keeping track of such information, the family may find itself without protection from overtime liability. This would be especially true—and particularly consequential—if the reason the family was being investigated by the Department (or sued by a plaintiff’s attorney) is because the primary third-party employer ceased to operate.

As a result of these changes—in particular, the elimination of the exemption for employees of third parties—the cost of employing a companion employed by a third-party will increase. At a time where controlling the costs of care is critical to American families, this rule will push those families away from third-party employers, and towards direct employment. As a result, American families will now have to navigate a complex web of regulations to determine whether they are in compliance with their minimum wage, overtime, federal and state tax, workers compensation, and unemployment insurance obligations.

---

Chairman WALBERG. I appreciate that. I am sure you will get questions that cover your remaining statements. I just hope that

some of your comments will not be taken as directives to the Department to add more regulations and restrictions.

I now turn to the chairman of the full Education and Workforce Committee, Chairman Kline for opening questions.

Mr. KLINE. Thank you, Mr. Chairman for turning to me for questions. I appreciate the courtesy very much. Thanks for the hearing.

I am going to pick up, Mr. Passantino, on where you were going because I am trying to understand how if you are an individual or family who is privately hiring a care provider, this is not a third-party, not a company, how would DOLs inspectors go about investigating and enforcing these rules?

Here is the family, got someone who needs assistance, companionship, you hire somebody. How does DOL come to the house and say—how does that work?

You have got to keep track of an hour-and-a-half in an 8-hour day, how would that even work?

Mr. PASSANTINO. There is some guidance in the regulation that talks about checking boxes as to how many hours somebody works in a particular schedule, but I think that that is intended to cover how many hours does somebody work in the course of the day.

What you are really needing to track is how much time the worker spends on a specific task and the specific tasks that would eliminate the ability of the family to use the exemption.

The only way that the Wage and Hour Division would be able to do that is to talk to the worker and the only opportunity that the Wage and Hour Division would have to understand the employer and that circumstance's side of the case is to talk to the family.

Whether that investigation takes place inside someone's home I suppose is a different question, but the only way that you can get to the key question of what percentage of time does this worker spend on which task is to talk to the worker and the family members responsible for watching over that person.

Mr. KLINE. I see. Thank you.

Mr. Bensmihen, can you elaborate for us a little bit on what you believe is the Department of Labor's fundamental misunderstanding of the companionship industry?

Mr. BENSMIHEN. My legal—department's fundamental mistake is that again, caregivers currently have a choice as to whether or not they want to work in someone's home. If they work for an adult day care facility, if they work for a nursing home, if they work for hospital, they know they are entitled to time and a half.

The individual who lives at home—like the doctor doesn't say when Mrs. Jones falls in the hospital and it is her third fall, the doctor says "Mrs. Jones, this is your third fall. One more fall and you are going to have to go into institutionalized care," and Mrs. Jones finally says, "Okay, I will get some help. I will get live in care."

The doctor doesn't say, "I am going to pay for it." When someone is in their own home, I think the department is not looking at that issue and it hurts the 43 million disabled Americans.

Mr. KLINE. Okay, thank you very much.

Ms. Andrews, you are in competition, I am sure, in business like everybody.

What industries do you compete with for workers, and do you believe as the Department of Labor has stated that the consequences of its regulations will be to reduce turnover in your industry, which is according to the department currently about 50 percent?

Ms. ANDREWS. I don't think that the workers—this will increase our retention and access to workers. I think in fact just the opposite will happen.

When we have workers who are—if their hours are changed to stay within a 40-hour workweek, they may go to additional competitors. They may go to work privately. They make go to work at Starbucks. That actually decreases the access to qualified caregivers.

So I think that our staff and employees that work in this industry do so because they feel that calling, but they have to make a living, so I think that that access to workers if their hours are changed or decreased will inadvertently cause a ripple effect that not only will we have less access to qualified workers, the workers that we have will become less available to us.

Mr. KLINE. Okay, thank you. I see my time is about to expire. Thank you very much to all of the witnesses for being here.

Mr. Chairman, I yield back.

Chairman WALBERG. I thank the gentleman. Now I turn to my ranking member, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman.

I want to thank the witnesses for their testimony today. Obviously there is a difference in point of view that is on full display. One common area though which between certainly Ms. Andrews' testimony and Ms. Kulp's is the high dependence on Medicaid that is in this industry.

I would just note that last spring the house Republican budget proposed to block-grant Medicaid and cut it by one-third. So when we talk about the threats to this sector of the healthcare industry, I would just note that, that is a far greater existential threat to the future viability of agencies such as your own if governors and state legislatures were left with that.

Again, like many of the people in this room, my dad had a home health aide at the end of his life, and certainly, I am deeply—I remember to this day the guy who stayed with him for hours at a very difficult time.

I also set budgets for Medicaid in the State of Connecticut and worked with agencies and recognized that the Ryan Budget that was passed last spring poses a far greater threat to the future viability of your industry than anything we are talking about here today.

Ms. Kulp, obviously you are somebody who is living with the reality of minimum wage rules that are again in line with the U.S. Department of Labor. One area, which in your written testimony you mentioned, but didn't get a chance to in your oral testimony was talking about the impact of excessive overtime in terms of the performance of your workers.

Again, when you look at the Fair Labor Standards Act, one of the things that it was trying to do back in the 1930s was to control out-of-control overtime because of the impact it was having on both the

individual worker and also performance. Maybe you can speak to that for a moment.

Ms. KULP. Sure. I believe that 40 hours is actually a great work-week for a home health aide.

It is a very hard work, so when you have to work 60 or 80 hours, you can't be as fresh or as careful, and I think that it really impacts both the worker but also the consumer. We have had experience with this. We actually have a new program where we let consumers hire their own attendants and then they're our employees.

As part of that, we have said, look, we have to limit the number of hours that your aide works to 45. So if you have 120 hours, then you have to get three attendants to help you and people have said, "Okay, we will try that."

What we have found is that consumers really appreciate it because they get fresher people to take care of them, and the workers feel so much less stressed because they don't have to be available 40 or 80 or 100 hours a week, and they just have some time to take care of their personal business.

And if somebody gets sick, there is always a backup person to take care of them. So I think it just makes sense in the new world of home care where many people are getting many, many hours of home care, and it is saving us money by letting them stay at home, and we should really appreciate, and I think JB said it really well, that if you go in an institution or you go in a different kind of setting, you will get overtime. Well, the work is the same. So why should folks be paid differently?

Mr. COURTNEY. And that is a good point. One of the things that I think a number of us are trying to do is recognize parity between in-home care and institutional care, whether it is the observation bill challenged in terms of trying to protect Medicare coverage for people coming out of hospital after 3 days and is being threatened right now with some new trends in the classification of coding for inpatient hospitals, as well as again, long-term care insurance policies recognizing home healthcare services on par with institutional care.

This rule in my opinion is just totally consistent with really sort of raising the stature of your industry as opposed to sort of treating it as a poor cousin. And retention, again we have heard concern about retention here this morning. What is your real life experience in terms of retention?

Ms. KULP. Well again, our real-life experience is that our aides, where the retention rate is I think 20 percent, 30 percent, ours is more like 60 or 70 percent, so we know that when people have decent full-time jobs where they get benefits, and they get time-off they tend to stay in the work.

Mr. COURTNEY. And the stress level issue, there is not excessive overtime.

Ms. KULP. Right, exactly.

Mr. COURTNEY. And that burns people out.

Ms. KULP. It certainly does, and they make mistakes. They do things that aren't right and that is a real liability to our business if somebody is doing something incorrectly and something bad happens.

Mr. COURTNEY. Again, I want to thank you for being here today. I think people should take a deep breath here and recognize that folks like you and in the other states that have this situation, this structure before have functioned and grown and that is really what the goal should be for all of us.

I yield back.

Ms. KULP. Right. Thank you.

Chairman WALBERG. I thank the gentleman.

I now turn and recognize the gentleman from Indiana, Mr. Rokita.

Mr. ROKITA. Well, thank you, Chairman. Good morning.

Good morning to the witnesses. I appreciate each of you being here.

Continue on this kind of line of thought, I would like to first turn my attention to Ms. Andrews and Mr. Bensmihen.

Picking up on liability, has liability concerns overwhelmed your business model? Do you have insurance?

Ms. ANDREWS. Absolutely we do have insurance. We have professional, general, liability. We have workers comp insurance.

Mr. ROKITA. Has liability been a problem with your business model as you have executed it? The claim here is that there is a concern about liability, that people who are overworked are going to make mistakes and injure your clients. Is that a problem?

Ms. ANDREWS. That has not been a problem. We don't—

Mr. ROKITA. Mr. Bensmihen?

Mr. BENSMIHEN. It is not a problem. Again the example that was recently used by Ms. Kulp is that if someone breaks their hip and needs help, it is a very different person than someone who was resistant to getting care at home and now has dementia and finally has accepted to create this friend relationship with a live-in caregiver.

Those relationships tend to last 4 and 5 and 6 years, which now the companionship exemption if it goes into effect the way the President wants, would be eliminated.

So we have to look at the individual who is getting the care. In terms of liability, there is no liability because individuals who believe that their parents need different shifts request it. Children know their parents best. They come to us when they are really sick. We facilitate it.

Mr. ROKITA. Is your testimony that the Department of Labor activists don't know—

Mr. BENSMIHEN. It is my testimony that—

Mr. ROKITA [continuing]. Don't know their families and the clients as well as their—

Mr. BENSMIHEN. They don't know this industry.

Mr. ROKITA. Right.

Mr. BENSMIHEN. They do not know this industry.

Mr. ROKITA. Turning to the turnover, Ms. Kulp makes mention in her testimony both written and verbally that her business model is superior to each of yours the way she set it up and reduces the turnover. Can you speak to turnover in your companies and industry? Is it a problem?

Ms. Andrews first.

Ms. ANDREWS. Turnover certainly across the country is an issue in this industry, but I don't believe that it is related specifically to—

Mr. ROKITA. Hours worked?

Ms. ANDREWS [continuing]. Hours worked. I think often times we use employee populations that are professional caregivers, but we also use nursing students. Where I live, we have four nursing schools that we draw on for our employees, and so there is an innate turnover with that population as they continue on in a different level of professional care, but our core caregiver groups are very consistent and stay with us. Many have been with me as long as I have owned to the agency—

Mr. ROKITA. Thank you.

Ms. ANDREWS [continuing]. Over 10 years.

Mr. ROKITA. Thank you.

Mr. Bensmihen? Same question.

Mr. BENSMIHEN. I deliver a consumer directed model, which means that the caregiver and the client decide how much they want to pay and whom they want to hire. Our job as a licensed entity is to make sure that their credential is verified and screened.

I have to say the turnover, the way it is set up now, is minimal. It is nonexistent because they have chosen their caregiver. They have figured it out. They don't worry about the issue of overtime because they have made the choice.

I will tell you as a person with a disability, people who are disabled for the most part find it offensive when an employee-based agency that is normally run by a nurse—I am a social worker by training—that is normally run by a nurse tell you how many hours of care you need and how you have to govern your life. I have been disabled a lot longer than a lot of these individuals have been nurses.

Mr. ROKITA. Thank you very much.

Turning now to the idea of why the Department of Labor has chosen to go down this road, I am wondering if either of you, Ms. Andrews or Mr. Bensmihen, have heard complaints from employees about the hours worked or the wages or are there shortages? I think this goes to Mr. Kline's, Chairman Kline's question, in your industry. Why isn't the free market working? Why isn't free enterprise working here? Why isn't there supply meeting demand as the Department of Labor would have you believe?

Mr. BENSMIHEN. Our caregivers are very happy with working their 50 and 60 hours with the same exact individual. Our caregivers are very happy to work in the live-in pool if you will. It is a different caregiver.

You have to understand as someone who runs a licensed state professional business, I have a pool of caregivers who are live-in, and that is how they are distinguished. That is what they want to do.

That is how they want to deliver their services, and I have a pool of caregivers that want to work hourly. They are different individuals. In the case that Ms. Kulp mentioned earlier, that is an individual who chooses to work hourly, and yes, we figure out a way to have different caregivers—

Mr. ROKITA. Do you believe your employers are smart enough to make their own employment decisions?

Mr. BENSMIHEN. I believe employees are smart and consumers are smart enough to make their own choices.

Mr. ROKITA. My time is expired. I yield to the chairman. Thank you.

Chairman WALBERG. I thank the gentleman.

Now I recognize my friend from New Jersey, Mr. Andrews.

Mr. ANDREWS. Thank you, Mr. Chairman, for your courtesy.

I thank the witnesses for their preparation and their testimony today.

Mr. Passantino, if I ask my neighbor to come over and help me rake leaves this weekend, I hope he is watching, is he my employee?

Mr. PASSANTINO. Do I believe he is your employee?

Mr. ANDREWS. Yes.

Mr. PASSANTINO. I do not.

Mr. ANDREWS. I agree. If I understand your testimony correctly, if my daughter would go next door and watch the four boys that my neighbor has, for a period of time, just because the parents were called out unexpectedly, and she is doing it as a neighbor, your concern is that this new rule somehow might categorize my daughter as an employee. Is that right?

Mr. PASSANTINO. Well, the regulations provide an exemption for casual babysitting and the only reason why you need—

Mr. ANDREWS. But as you say in your testimony, before we get to the exemption, we have to get to the issue of who is an employee and who is not.

Mr. PASSANTINO. That is exactly right.

Mr. ANDREWS. So are you concerned under that example that these regulations would classify my daughter as an employee?

Mr. PASSANTINO. Under the domestic services regs, the employment triggers at 8 hours in a workweek. So if she is doing it for more than 8 hours a week, then yes.

Mr. ANDREWS. Where in the regulation does the regulation alter the definition of an employee?

Mr. PASSANTINO. I don't believe that it does.

Mr. ANDREWS. It does not, as a matter of fact. So what is the basis of your claim then that the regulation is quote—"converting friendship into employment?"

If you just said, which I agree with you, that the regulation does not change the definition of employee, then how do you draw your conclusion that it is converting friendship into employment?

Mr. PASSANTINO. The fundamental basis of the regulation if you look in the preamble talks about this statement in the Congressional record about why the exemption is needed, and the exemption is needed because of a neighbor who comes to sit with a sick parent and if that is the need—is the reason—

Mr. ANDREWS. Where does the regulation say that? And by the way, I read Senator Burdick's speech. I don't think that is what he says either, but I think we can resolve this dispute about a preamble—I don't know that we have ever had a U.S. Supreme Court case by the way decide on the preamble of the Constitution.

Usually it is the therefore enacted clause that matters, but I looked at the FAQs that are available through the department's Web site and it says the following, "What FLSA policies were not changed by the regulation?"

Here is the answer, quote—"The final rule makes no changes to the department's long-standing regulations concerning whether an employment relationship exists."

Mr. PASSANTINO. But what it does is has made it consequential. They have changed—

Mr. ANDREWS. If I may, if I may. You just, I think, agreed with me that my daughter going next door to babysit because we are doing it as friends for our neighbors, she is not an employee. You agree with that, right?

Mr. PASSANTINO. I would agree with that.

Mr. ANDREWS. Well then I don't understand this whole point about converting friendship. Give me an example where someone who is presently in a friendship relationship would now be treated as an employee under this rule. Give me an example.

Mr. PASSANTINO. So if your neighbor came to watch your sick parent and did so for 8 hours in that week, sat with them for a day, the regulations say that that person is a domestic services employee.

Mr. ANDREWS. Where does the regulation say that?

Mr. PASSANTINO. In the definition of domestic services employee.

Mr. ANDREWS. No, no, and that definition—right—is one that holds that within the FLSA, but let—I am stipulating here there is no expectation of compensation.

My neighbor did this because we are good, good friends and neighbors. There has never been a discussion of me paying him anything. He has no expectation of that. You think he is my employee under these regulations?

Mr. PASSANTINO. I don't, but the Department of Labor in the past several years has focused on volunteers and interns neither of which have the expectation of compensation either.

Mr. ANDREWS. No, no. You are a very good lawyer. You are a very good lawyer. "In the past several years," really is not a very valid point. I just read you what the department said is guidance interpreting their own regulation that nothing changes in the long-standing definition under the FLSA of an employee, and you just agreed with me that it doesn't change.

Mr. PASSANTINO. In my opinion, it doesn't—that person is not an employee, but my opinion is not what matters when the Department of Labor comes knocking on the door.

Mr. ANDREWS. No, what matters is what the Department of Labor says, and the Department of Labor says, and I am quoting, this is not from a preamble or someone's imagination. This is what is on their Web site. "The final rule makes no changes to the Department's long-standing regulations concerning whether an employment relationship exists."

I think that settles this, and I think that your claims, that this converts friendship into employment, are completely specious and false.

I yield back.

Chairman WALBERG. I am always amazed at two lawyers going after each other especially in the labor realm, so it is a show. [Laughter.]

Appreciate that. Let me ask Ms. Andrews, your testimony highlighted a population that unfortunately has been often overlooked during the debates on this regulation.

You referred to your business' service to disabled veterans, a unique and sadly growing area of service need. Can you speak to the kinds of needs and services your caregivers provide to these clients? And then secondarily, what changes do you anticipate in light of the Department of Labor's new regulations?

Ms. ANDREWS. Thank you for that question. We are honored to care for our veterans through the Veterans Administration program in California.

Many of the services are unique for our veterans because of the types of illness and issues that they have notwithstanding PTSD is one of the significant ones.

For them, having a different caregiver in at a different time is not just an inconvenience, it is often times a psychological trauma. We don't even go to do our supervisory visits without having them understand and know that we are coming because of some of the disease processes that goes on.

So having a consistent, unique caregiver for a veteran is a very important component of their care. We actually hire a lot of our veterans, younger veterans to work in caregiver capacities, so it makes for a great mix because they understand the issues that are unique to veterans.

Under the new rule, I have been working with our Veterans Administration so that we make sure that the time constraints will meet the new standard because they do not have the ability to pay the overtime or authorize it for their care.

Chairman WALBERG. Unique needs—

Ms. ANDREWS. Yes.

Chairman WALBERG [continuing]. Demanding unique situations and considerations.

Mr. Bensmihen, in your prepared statement, you refer to clients use of long-term insurance benefits to help them pay for services. You refer to some plans that will not automatically increase their weekly caps to accommodate the Department of Labor's new overtime requirements.

Could these additional costs cause increases in the price of long-term insurance overall, and what is the potential that these clients will be dropped from this sort of coverage?

Mr. BENSMIHEN. Thank you for the question. It is twofold. Number one, the people who bought the insurance bought it when they were healthy, so they bought it 10, 15 years before they were actually going to use it, and they bought it with the understanding of the companionship exemption that if you have a live-in—if you have a daily benefit of \$200 a day, \$200 a day was looked upon as an excellent benefit from one of these policies.

The new regulations right now basically say that if you are going to pay someone—and I am making up a number just to keep the number simple—\$10 an hour, after 40 hours of care, you are going to \$15 an hour—just a regular time, \$10 times 24 is \$240. Right

there, the policy that they paid for out of pocket is now null and void.

I predict that the insurance industry will be at a big risk and there might be lawsuits. I don't know what will happen in the future because it wasn't intended. It was sold with good faith, but I don't know what is going to happen.

Chairman WALBERG. Unintended consequence that diminishes the ability for people to care for themselves, let alone care for their family—

Mr. BENSMIHEN. Correct.

Chairman WALBERG [continuing]. Through no fault of their own, doing responsible planning, lost that.

Mr. Passantino, in your testimony you raised a number of difficulties facing individuals who privately hire care providers for themselves, for themselves not third-party, but for themselves or for their loved ones.

As these arrangements differ from those hired through third parties in that there is less of a traditional business like paper trail, how would the Department of Labor inspectors go about investigating and enforcing these regulations?

Mr. PASSANTINO. I think that—

Chairman WALBERG. Give us a good guess.

Mr. PASSANTINO. Given that 98 percent of the folks performing this work now are employed by third parties, I guess there is a limited sample on how we can know for sure, but a typical investigation involves either a complaint by an employee or a Department of Labor investigator deciding or manager deciding that they are going to conduct a particular investigation.

They would talk to the employee and then they would talk to the employer, in this case the family. They would need to speak with family members and to speak to the employee to ascertain whether there was an exemption that would apply and what hours someone worked and what rates were applied as well.

Chairman WALBERG. Extremely difficult for an individual. Would you characterize it as that?

Mr. PASSANTINO. A family that was unaware of their record-keeping obligations and specifically the fact that they had to keep track of what tasks were performed when, it would be very difficult for that family to prove.

Chairman WALBERG. Especially if they are not on-site the entire time.

Mr. PASSANTINO. Correct.

Chairman WALBERG. Thank you.

My time is expired. I recognize Mr. Pocan for your 5 minutes of questioning. Thank you.

Mr. POCAN. Thank you, Mr. Chairman, and thank you for having this hearing.

I appreciate the witnesses coming, especially in this industry. I really appreciate the work that you are doing. I, 20-some years ago, I served on a Dane County Board of Supervisors. I served on the human services board and in my county board district I had a large population of people with disabilities who had caregivers and it was really important, and I will never forget—and this is with 2 decades of public service—talking to folks, and one of the biggest

issues they had was that their caregivers would turn over two or three times in a year, and they didn't have that quality of life that they so needed, and it was a really big issue, and it really stood out, and so I have always remembered that.

So when I was in the legislature, one of the things that I was able to do was help create a quality healthcare commission working with people who were some of the disability advocates as well as some of the other folks to see that one, we could try to help on overall wages so that people could stay in the industry longer, but also on things like helping people have a good registry for people in case someone wasn't available.

Really that continuity of care just was reinforced throughout those 2 decades, so I was really glad to see everyone agreeing how important it is that we have people who can still stay in their homes. It is more cost-effective. It is far better for the person overall, and I love the term heart work, how you referred to the work because I think most people I know in this area really, that would definitely be the definition of what they are doing.

I did notice though, Ms. Kulp, your body language during a question you really wanted to answer, and I would like to give you a chance because I saw how you were chomping at the bit to do it.

The question specifically on turnover not specifically related to hours worked. Can you just address that a little bit more because I know you really want to answer that?

Ms. KULP. I think that we see—and I just want to—I think somebody said that our model is superior to other models, and I don't believe that. I just think it is a little bit different, and my point being that you can actually pay people overtime and still make a profit. I am as interested in making a profit as everybody here is, so I think there is great turnover.

I think part of it has to do with yes, people are burned out because they are working too much, but there is also a part-time workforce that could be utilized. If they got fulltime hours then you might actually decrease overtime that way, so it is a balancing act. This is a very, very intensive, hard business.

My colleagues know that you always are balancing the needs of the consumer, the worker, the family, and trying to do the best you can, so I think this just gives us an opportunity to pay workers what they are worth.

Most workers really appreciate that. I have had workers say, "I am happy to have overtime, but I want my colleague to have a job also, so give them my time so that everybody has 40 hours." That is the kind of people I work with.

Mr. POCAN. Yes, and definitely I can tell you all care very much about what you are doing. The problem is in the industry we do know about 40 percent of the people in these professions are receiving public benefits like food stamps and Medicaid and however we can help lift that tide.

I have been an employer for 25 years. Both of my parents were small business owners, so I know much of what you are doing on a regular basis, you are a jack of all trades in doing things.

Let me ask the question though too, if I could, Ms. Kulp, in Pennsylvania I believe your state you already has some of these provisions in place. How has it affected the industry? Have you had

problems for the companies or for turnover? Has it had any negative impact?

Ms. KULP. No, I think it has actually—our revenue is growing. We now have about \$21 billion of revenue from home care. We predict that it will go up to \$25 billion or \$26 billion by 2020.

We have seen many, many homecare companies open up, so it hasn't affected our business at all. In fact, our business is growing just like it is across the country because the need is so great.

Mr. POCAN. Sure. And when you talked about that 60 to 70 percent retention rate, I was really interested to hear that because the industry does have potentially a high turnover. What do you attribute that to, that 60 to 70 percent?

Ms. KULP. That we keep people?

Mr. POCAN. Yes.

Ms. KULP. Well I think again it is having decent wages. We actually give people health benefits, which we have done since the beginning of when we started, and giving people adequate supervision, training, really valuing the work that they do, continuing to talk about how you can be professional, how you can do this work better, so really elevate the job.

I think that any of us who need, who want, who have a homecare person taking care of ourselves or somebody in our family wants that kind of dedication and professionalism in the person that does it.

We want that person to be trained. We want that person to be really good at what they do and really like their work because if they don't, it is not so great for the person on the other end.

Mr. POCAN. Sure. And I appreciate that because I have a similar business model. We pay over double the minimum wage to our lowest paid employee, but I have the luxury of having people stay around and that makes my life a lot easier.

I didn't lose my hair over stress from that. I lost that way, way long ago, but I do like the fact that, just to wrap up with it, that you mentioned that gas, healthcare costs, and some of the reduced payments are some of your major drivers, and we appreciate that.

Chairman WALBERG. I thank the gentleman.

I probably kept a little bit of the remaining hair that I have as a result of people like those in our witness panel taking care of my mother and releasing some of the stress and the needs that I had, so what little bit I have left, I am glad it still there.

I am going to suggest that—no, I am going to do more than suggest, we are going to do this—have a second round. A little bit flexible—more of a discussion. Feel free to jump in and seek recognition, but we won't do it as a normal 5-minute, 5-minute, 5-minute.

As well as the panel, we will offer that opportunity as well to more of a discussion to just maybe get a few additional questions and issues brought forward. Let me start as my colleagues are thinking a bit here.

I wanted to ask Mr. Passantino, specifically we talked about the individual purchaser of home companionship care, but going back to the third party, I am interested on your thoughts on how much time, additional time homecare employers will need to spend to comply with the new regulations because time is money and regu-

lations add generally more challenges to making sure that you cover all the bases.

Any guesstimates?

Mr. PASSANTINO. Surely they are going to have to read the regulations and the facts sheets and familiarize themselves with the requirements under the rule and that is going to take a couple of hours I am sure.

Tracking the hours that someone works obviously requires additional staff and additional mechanisms in place to understand how much time a particular employee is spending on the jobsite doing the work that they do.

I would say that in order to—once the third-party employer is involved the exemption is gone, so the issue about tracking the percentage of time that one of these workers performs in a particular task goes by the wayside unless it is a third-party employer who wants to preserve the exemption for the individual.

In the rule, the department maintains the exemption for an individual user even in those circumstances where there is a third-party employer, but the only way that the individual can establish that they are entitled to the exemption is if they have the records to prove that, as we talked about earlier.

Once you have given that opportunity, once you have given that responsibility over to the third-party, the individual is not necessarily going to pay attention to that, so in a case where there is a third-party employer, if they are going to do right by the individual, they will also need to track the hours that the worker spends on those particular tasks, which again is another, an entirely different level of hours reporting and understanding what the workforce is doing at a particular time, so it is a significant amount of time spent to do that.

Chairman WALBERG. Ms. Kulp, I see—

Ms. KULP. Yes, my understanding is that it actually exempts the individual employer so that if somebody wants to go ahead and hire their neighbor to take care of them, they are not part of this.

Mr. PASSANTINO. Right, so the exemption continues to exist for the individual employer provided that they still—the worker still meets the duties obligations.

Chairman WALBERG. And the 20 percent issue, right?

Mr. PASSANTINO. And the 20 percent issue. In the context of where there is a third-party employer, there likely is going to be what is called joint employment between the person, the individual using the services and the third-party employer.

The Department's position in the regulation is that the third-party employer can't use the exemption but that doesn't eliminate the ability of the individual to use the exemption, but the individual still has to prove that the worker spent less than 20 percent of his or her time on the tasks that are identified as exemption defeating on the care services.

Chairman WALBERG. So my mother with dementia would somehow have to keep records to make sure that 20 percent wasn't crossed? Is that what I am hearing?

Mr. PASSANTINO. Someone would.

Chairman WALBERG. Someone would. My wife who is outside of the home for a good portion while a home companion care provider was there would have to figure that out.

Mr. PASSANTINO. Correct.

Chairman WALBERG. So again, a challenge.

Mr. PASSANTINO. A significant challenge.

Chairman WALBERG. Mr. Rokita? You had—

Mr. ROKITA. I thank the chairman. Just a couple of follow-up points, and I appreciate the chairman going a second round.

Mr. Passantino, witness to your exchange with another member of the committee who practiced law in the past but doesn't currently, I thought it was needlessly rude the way that exchange ended. Not that I am not for being rude when rudeness is required, but I don't think it was required here, calling your claim specious.

Do you want to address that on the record?

Mr. PASSANTINO. I believe that when you look at the totality of the department's regulation and the activities that they have identified as falling within the scope of the exemption, the only conclusion you can draw is that the department believes those activities to be employment, and then the question of whether compensation and how compensation factors into that determination is open.

The department has spent a lot of time focusing on investigations and guidance with respect to volunteers and interns and has largely eliminated the ability of for-profit entities to use either one of those.

So you are looking at a situation where the department is attacking employment relationships that lack compensation. There is no pay in those circumstances, and that is what they would be doing here.

You would be looking at a circumstance where maybe there is pay, maybe there isn't pay, but there is no guidance at all on when the department is going to determine someone becomes an employee for the purposes of this rule.

Mr. ROKITA. Okay, thank you.

I want to focus on your employees for a second, Ms. Andrews and Mr. Bensmihen. Do you have employees who ask you for more hours?

Ms. ANDREWS. We do often.

Mr. ROKITA. And Mr. Bensmihen?

Mr. BENSMIHEN. Yes.

Mr. ROKITA. How often do your employees say, "No, I don't want those hours. I want you to hire more employees so that we all can be treated equally."

Ms. ANDREWS. I can honestly say I have not heard them say that.

Mr. ROKITA. How long have you been in business?

Ms. ANDREWS. I have had my own business for over 10 years.

Mr. ROKITA. Mr. Bensmihen, same set of questions.

Mr. BENSMIHEN. Yes, they have never said that. I want to make something very clear. Everyone, at least for myself, I believe that caregivers should make more money and if they are able to make more money, they should get overtime.

The way the exemption is currently in effect, it gives everybody that opportunity. In other words, we have clients, we have children

who say, "My mother's caregiver is so fantastic, I want her to get overtime even though there is an exemption."

They can pay for it, but I want to bring everyone's attention to Justice Breyer in the Coke v. Long Island case. He made a very funny comment that still rests with me. He said, he said, "I would pay for a caregiver for my mother. I am not sure Justice Scalia would, but I would pay for a caregiver for my mother, but I can't imagine," said Justice Breyer, "I can't imagine the law was written for nine Supreme Court justices who can afford to pay for it. It would have to affect everyone who needs home care."

So again, the exemption the way that it is now, if someone has the ability to pay for it, it can, but also for those who can't afford to pay for it, it protects them to maximize their independence currently at home.

Mr. ROKITA. Great. Thank you for your testimony.

Ms. Kulp, I didn't get to ask you any questions in the first round. I appreciate your—I don't know if it was clarification, I don't want to put words in your mouth—but you said no, I don't think that my business model is superior necessarily to your two colleagues, it is just that it is different, and then you went on to say, well I have employees that want to make sure their fellow employees have the same opportunity for the same kind of hours.

Do you think that is the mission of the Department of Labor in your personal opinion?

Ms. KULP. No I don't think it is the mission of the Department of labor, but I do think that if you are going to have a successful company—our company happens to be a worker-owned company so that the workers actually—

Mr. ROKITA. An ESOP?

Ms. KULP. No, it is not an ESOP.

Mr. ROKITA. Okay. Well

Ms. KULP. It is a co-operative.

Mr. ROKITA. Okay.

Ms. KULP. So what it does in this world is really put another incentive for workers—

Mr. ROKITA. So that is your choice—and I appreciate you saying you don't think it is superior, but I just want you to understand in my opinion, and I think in fact this is the case, your testimony here today in favor of this Department of Labor rule, which will have an effect across the country, will be the law of the land, so to speak, at least administratively, is in effect saying that your business model is superior to your colleagues'.

Ms. KULP. Actually what it is saying is that I think that direct care workers deserve overtime protection. That is what I am saying.

Mr. ROKITA. And I appreciate your opinion. And let's let the free market decide if the rest of the country should adopt it or not or maybe you should expand your business into your competitor states. I don't know, but I don't think we need the Department of Labor, Mr. Chairman, to decide that.

I yield back.

Chairman WALBERG. Thank the gentleman.

Mr. Pocan?

Mr. POCAN. Thank you, Mr. Chairman. I just want to follow up on that. I think actually your presence here is just saying there are various business models, and in a state that has already had some of this in place, things have gone well.

You haven't gone out of business. Your other friendly and maybe not so friendly competitors haven't necessarily gone out of business, that it is a model that does work, so the fact that the model does work in these other states, it will work nationally.

So I think it makes perfect sense that people from California, Florida, and Pennsylvania here to talk about their various experiences, because wages probably are a little more in California maybe than some other states and you are bringing that experience, Ms. Andrews.

But, Ms. Kulp, I think that, that probably was not entirely fair. I am glad you are on the panel. I am glad all of you are on the panel offering your unique perspectives, and I really appreciate the work again you are doing. I just wanted to add that thank you.

Ms. KULP. Thank you.

Chairman WALBERG. I thank the gentleman, and I thank the panel for the responses and it has been very helpful to us.

I now turn and recognize my friend, the ranking member, Mr. Courtney, for closing statements.

Mr. COURTNEY. Great. Thank you, Mr. Chairman.

I want to again thank the panel for your really outstanding testimony here today. I also would be remiss if I didn't recognize Ms. Andrews as ably assisted today by Bill Dombo in the back who was a law school classmate of mine at the University of Connecticut many, many years ago. And even though maybe I don't totally line up with the testimony that you two have worked on here today, again, he is an outstanding lawyer and a good guy.

But back in those days when we again had constitutional law classes I can remember again as long as we are quoting Supreme Court justices, Louis Brandeis once observed in our federal system. States can act as laboratories for democracy.

In other words, if you look at the great progress this country has made over the years in terms of workers compensation, basic protections for working people, it didn't happen from Washington first.

It happened in states first, and over time, that experience kind of bubbled up to the point where we again moved forward with the national standard to recognize and protect people who are injured on the job or again needed basic protections, and by the way the minimum wage and overtime started as state initiatives.

So here we are today with a sector of the U.S. economy that has been excluded from the protections of the Fair Labor Standards Act up until now. Again, initially we had domestic workers like cooks and gardeners who were excluded from the Fair Labor Standards Act, but over time as a nation, we moved forward to include them into those and recognize them as again on par with the rest of society, and I think that is what the Department of Labor is attempting to do.

The good news is we live in a country where there is no final word, where things are absolutely forever engraved on it—on all of us as citizens that we still have the opportunity like we are today to point out issues.

And I talked to Secretary Perez after these standards were adopted and again, that department welcomes input. In fact, that was one of the reasons why there was a 1-year hiatus to again continue the dialogue, but the notion that we are going to repeal it or we are just going to go back to the status quo, that is not happening.

Okay? So we have got to recognize that the people who do this amazing work every single day for families are going to be included just like other sectors of our country in terms of these basic standards and protections.

And again, what I would just to say to Ms. Andrews and Mr. Bensmihen, when the time comes to protect the funding for your agencies in terms of Medicaid, you will have no stronger allies than my colleagues here on this side of the rostrum.

The Ryan budget, which will block-grant Medicaid and cut it by a third poses a far greater existential threat to the delivery of these services for low income Americans than anything we are talking about here today, and I say that as again someone who did those budgets at the state level for many, many years.

So again, I welcome the hearing here today to talk, really put the spotlight on the value of what you do because frankly during the health care reform debate, long-term care was by and large omitted by both sides and frankly, when we look at the demographics of this country we had better get moving fast in terms of trying to upgrade our systems because we are going to need it desperately.

And again, the projection of growth that you mentioned here today and that is based on, I am sure, the structure of Medicaid staying reasonably in place, which again we have a budget on the table right now which would just obliterate that structure and that is something that we need to stay focused on when we talk about the challenges of your industry.

So again, I would just pass along to you my dialogue with the secretary that he does not view this as a completely immovable set of rules, that they are still willing to continue that dialogue, and I would encourage you to work with our offices and the department to continue that process.

And with that, I yield back, Mr. Chairman.

Chairman WALBERG. I thank the gentleman. And certainly it is very clear that on whatever side of this dais we sit, we agree that the work that you do is unbelievably important and a service that many people wouldn't do.

Ms. Andrews, Mr. Bensmihen, Ms. Kulp, the fact that you are in the industry and providing the services and doing it out of a heart of care for individuals is huge and the people that you are employing, from my own experience with my mother watching people who did this day in and day out for a period of a couple of years are exceptional people with unique abilities, things that I wouldn't do frankly.

I don't say that to my shame. I just say that I am not plumbed that way. For my mother is one thing, but to do it for others and with such care, it is amazing.

Mr. Passantino, I appreciate your involvement in the whole issue and the insights that you bring to the table here.

Mr. Bensmihen, I will selectively select you out for unique praise. One who also receives the care and lives it, your unique ability, not disability, but the unique ability to understand and present the case from one who has experienced it and who has not been held back, but has pressed forward is, I think I can say for all of my colleagues, is inspiring. Thank you for being here.

We have asked the administration by letter to provide us with information, basically to say define the problem. Tell us why this regulation is needed. Not to establish the remedy before you define for us the problem. To date, we have not received that information, and I hope that will be forthcoming now that the rule has been put out.

I see 15 states including my own of Michigan that have taken this approach, and I would concur with my colleague, the ranking member, that states are laboratories of reality in what can work, what is needed, but they are also sometimes laboratories that put things together that really ultimately are not necessary but they are states and they are doing that, and I would uphold their rights to do that.

For the federal government to come in and make a sweeping policy change following the pattern of 15 states versus the rest of the nation that have had the opportunity to do that as well I think is suspect, and I think ought to be questioned, because indeed in the time we live right now with an economy that is sluggish at best, in an economy that is producing less middle-class as opposed to more, it is taking more people out of it.

And while my wife and I as a result of the goodness of the taxpayer have had the ability to assist my mother in her final years with this type of care, plenty of my neighbors surrounding me would not have that same benefit or that same choice.

The cost would have been prohibitive for them to do it. My mother had the benefit of having the same caregivers day in and day out when they were brought into the home to the point that it was no frustration to her to see anyone different there because they weren't different.

The only one different was my wife that came in, and that was normal too, and me, if she recognized me, was not a concern to her.

Those are issues that are real life, and I think that just simply making a sweeping plan that will ultimately cut people out, I believe, from the ability to have that type of care, the ability to be able to provide for themselves, the ability to be able to pay for it, and equally importantly for home health caregivers to have jobs that meet their needs, provide the level of income that they have to have to pay for their own health care or their mortgage or you name it, I think will be severely stressed by this.

This isn't the final action that we will take, but this is certainly a great first step this term, subsequent to the rule being put out, that we can address, and we will continue to do that and work together as a subcommittee and as people interested in the issue to come to a suitable conclusion.

There being no further business, the committee stands adjourned.

[Additional submissions of Mr. Walberg follow:]

**Prepared Statement of James Mark, President,  
Private Care Association, Inc.**

The Private Care Association (“PCA”), since 1977, has been the voice of private duty home care. PCA’s membership is made up of home care registries that refer self-employed caregivers to provide assistance with activities of daily living such as bathing, dressing, lifting/transferring, continence care, feeding/meal preparation, companion care, homemaker services and nursing services in the client’s home. The consumer-directed model of care is based on the idea of consumer choice in home care options and gives consumers the right to make decisions and direct the care needed. The principal advantages of consumer-directed care are that it costs less to the consumer, the caregivers typically earn more, it allows consumers to individually select caregivers, it provides greater continuity in caregiver relationships, and it supports caregiver entrepreneurship.

The final regulations (“the “Final Regulations”) the U.S. Department of Labor (“DOL”) recently issued that modify the companionship exemption<sup>1</sup> under the Fair Labor Standards Act (“FLSA”)<sup>2</sup> will have far-reaching effects on the consumers who need home care to remain independent as well as on the caregivers who provide the care.

Absent some type of change, the ultimate impact on consumers and caregivers resulting from the collateral damage the Final Regulations will inflict on home-care registries will be fewer home-care options for consumers; and a less efficient marketplace for freelance caregivers and those consumers who wish to self-manage their own home care. PCA believes the problems caused by the Final Regulations could be addressed (i) by the Congress enacting legislation that reinstates the companionship exemption; but this time using language that protects against a subsequent administrative repeal of the exemption; or (ii) by the Congress or the DOL providing clarification that will enable caregiver registries to continue operating their respective businesses without fear of being held to be a “third-party employer” for purposes of the FLSA of the caregivers they refer to clients.

*I. The Role of Caregiver Registries in the Home-Care Marketplace*

PCA members occupy a unique position in the marketplace for home care. Home care registries, by definition, are not “providers” of home care. Instead, a caregiver registry is a caregiver referral source. Its role is to facilitate the marketplace for self-employed providers of home care and those consumers who seek to self-manage their own home-care arrangement. A registry accomplishes this by providing two principal services, namely, (i) conducting rigorous background screening and credential verification of caregivers, as a condition of admission to the registry; and (ii) matching caregivers with consumers on a “just-in-time” basis.

The caregiver vetting procedure provides a critical consumer protection for the vulnerable population that utilizes home-care services. Because the typical recipient of home care is an elderly or disabled individual, and the caregiver will be alone with the care recipient in the care recipient’s home, care recipients and their respective families highly value the third-party vetting process that a caregiver registry provides.

The matching service that a caregiver registry provides is vital for this marketplace to flourish. This is because both sets of a registry’s clients, namely, the freelance caregivers and the consumers, are highly disaggregated populations; neither is easily identifiable.

Caregivers commonly operate out of their own homes and advertise their services through informal channels or through caregiver registries. Consumers who seek caregivers reside in their home or a retirement facility. The disaggregation of these “buyers” (consumers) and “sellers” (freelance caregivers) of home-care services presents a complex marketing challenge to caregivers seeking to find consumers who are seeking a caregiver. A caregiver registry offers a solution to this marketing challenge. It enables a caregiver to identify consumers who are seeking caregivers, and enables a consumer to identify caregivers who meet the consumer’s home-care needs and who already have passed a rigorous third-party vetting process.

If caregiver registries did not exist, the marketplace for freelance caregivers would continue to function; but it would function with less efficiency and with greater risk to the consumer. Internet-based options already exist, which enable freelance caregivers and consumers to find each other. The principal distinctions between a registry and the internet options available at this time is that the internet options do

---

<sup>1</sup> 29 U.S.C. §213(a)(15).

<sup>2</sup> Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60454 (Oct. 1, 2013) (to be codified at 29 CFR Part 552).

not offer the rigorous caregiver vetting process that registries offer, and they lack the human interface that registries offer, which many elderly and infirm clients prefer.

### *II. The Final Regulations Create Unmanageable Legal Risks for Caregiver Registries*

In theory, caregiver registries could be viewed as bystanders to the changes effected by the Final Regulations. This is because a caregiver registry, by virtue of being a referral source, but not a provider of any home care, would not be a “third party employer,” as contemplated by the Final Regulations. In practice, this is less clear. The ambiguity facing caregiver registries is illustrated by the Preamble to the Final Regulations, which includes an example of a caregiver registry that is “likely not” a third-party employer of a caregiver.<sup>3</sup> The fact that the conclusion is hedged, by the “likely not” language, suggests that there is no clear line at this time that can differentiate between a caregiver registry and a third-party employer.

The consequences of this ambiguity can be existential to a caregiver registry. The prospects of double damages<sup>4</sup> for failures to pay overtime and/or minimum wage to caregivers for the past two years,<sup>5</sup> plus attorneys’ fees,<sup>6</sup> is a financial risk that few caregiver registries are sufficiently large and profitable to withstand. The cost of litigating one of these cases is outside the reach of many registries.

By virtue of its role as a referral source, a caregiver registry does not set the hours worked by a caregiver or the rate of pay a caregiver receives for his or her services. Instead, these matters are controlled exclusively by the client and the caregiver—who are the only decision makers in a home-care relationship created by a caregiver referral. Once a caregiver registry refers a caregiver to a consumer, the consumer and the caregiver determine whether they will work together, and, if so, the number of hours the caregiver will work for the consumer and the rate of pay that the consumer will pay the caregiver. If those parties determine that the caregiver will work 50 hours per week, the consumer may, or may not, pay overtime rates for the ten hours worked in excess of 40 for the week. In that case, the caregiver registry could be liable for the unpaid overtime if it were determined to be a third-party employer.

What makes this dilemma especially acute to a caregiver registry is that if it were to exert control over the matters that expose it to potential FLSA liabilities, e.g., by requiring a client to pay overtime when required, or by prohibiting a caregiver from working more than 40 hours per week, these actions would compromise the registry’s independent-contractor relationship with the caregiver for purposes outside the FLSA, e.g., federal employment taxes, tort law and state unemployment taxes. It follows that the ultimate effect of the Final Regulations on caregiver registries is to create for them a prodigious financial risk with no meaningful way to manage the risk.

### *III. The Damage the Final Regulations Will Inflict on Caregiver Registries Will Not be Contained, but Will Also Harm Care Recipients and their Caregivers*

Commencing January 1, 2015, when the Final Regulations become effective, a caregiver registry will be in a regulatory environment in which it will operate day-to-day not knowing whether it will be sued by private plaintiffs or investigated by the DOL, and required to pay a sum that could put it out of business and potentially require its owner to file personal bankruptcy, if held personally liable. Obviously, this is not a pleasant prospect.

PCA believes a registry could react to this environment by either converting to an employee-based agency, which will enable it to control the new FLSA risks; or by continuing to operate as a registry, albeit with the new FLSA risks. Of course, some caregiver registries might choose to simply close the business, based on an assessment that the new legal risks are intolerable.

Registries that choose the first option and convert to an employee based agency will move into an entirely different type of business model that already is very crowded with many long-established agencies. Such a conversion would involve learning how to operate a completely different type of business that generally will require a different type of license at the state level.

To the extent that caregiver registries were to choose this option, consumers would be left with fewer options for meeting their home-care needs. As noted, a caregiver registry facilitates the consumer-directed home-care model where the con-

<sup>3</sup> 78 Fed. Reg. 60454, 60484.

<sup>4</sup> 29 U.S.C. §213(a)(1)(b).

<sup>5</sup> 29 U.S.C. §255(a). In the case of a willful violation, the statute of limitations extends to three years after the cause of action accrued.

<sup>6</sup> 29 U.S.C. §213(a)(1)(b).

sumer self-manages his or her own home-care arrangement. An employee-based agency offers a fundamentally different type of home-care solution, commonly referred to as agency directed. These agencies are “providers” of home care. This option is more expensive to the consumer, but it involves an agency being actively involved in the home-care delivery process. This is a principal distinction from a registry, which, as noted, is not a “provider” of home care but is instead a referral source. It follows that in markets where caregiver registries convert to employee-based agencies, consumers will be left with fewer choices available for meeting their home-care needs. Instead of being able to choose between the agency directed and the consumer-directed home-care options, as they currently can, they will be left only with the more expensive agency directed option. Of course, a degraded version of the consumer-directed home-care market would continue to exist, but without the human interface and third-party caregiver vetting process that registries offer. The consumers who continue to self-manage their own home care, by engaging caregivers on their own, would be exposed to a higher risk of exploitation or abuse.

Registries that choose the second option and continue operating as registries will need to have a high tolerance for risk. As noted, caregiver registries are predominantly small family owned businesses. But even the larger registries are not safe, as the larger the registry, the larger the potential FLSA damages. Because of the relatively thin referral fees that caregiver registries commonly charge for their services, a decision holding a registry liable for overtime and/or minimum-wages owed to caregivers for the past two years could jeopardize virtually any registry’s status as a “going concern.”

The preferred solution to this dilemma is for the companionship exemption to be reinstated. If that is not viable, it is critical that clarification be provided on how a registry can avoid “third-party employer” status. Because of a registry’s inability to control a caregiver’s hours of work or rate of pay, it has no ability to manage this new FLSA risk. Since it cannot manage the risk, its only viable strategy forward is to avoid the risk. To avoid the risk, a registry needs clarification on how it can operate its business and avoid “third-party employer” status.

PCA submits that to subject caregiver registries to this type of dilemma, namely, an existential financial risk with no ability to manage it, is highly inequitable to the registries; and is contrary to the best interests of home-care consumers and caregivers. Caregivers rely on registries to identify client opportunities; and consumers rely on registries to obtain immediate access to professionally vetted caregivers.

#### *IV. The Adverse Impact of the Final Regulations on Caregiver Registries Can Be Addressed*

PCA respectfully offers two possible options for addressing the new FLSA risks to caregiver registries that the Final Regulations create, namely, (i) the Congress enacting legislation that reinstates the companionship exemption; but this time using language that protects against a subsequent administrative repeal of the exemption; or (ii) the Congress or the DOL providing clarification that will enable caregiver registries to continue operating their business without fear of being held to be a third-party employer for purposes of the FLSA of the caregivers they refer to clients.

The PCA would appreciate the opportunity to work with the Subcommittee on these important issues.

---

#### **Prepared Statement of Hon. Lee Terry, a Representative in Congress From the State of Nebraska**

Thank you, Mr. Chairman, for allowing me to give a statement on this incredibly important issue. We are here today to examine a rule that has been a long time coming and which I have fought every step of the way. I have opposed this rule because it will render in-home care for many seniors and individuals with disabilities unaffordable.

My constituents are especially concerned about the Department of Labor’s final rule. Two major companionship services providers are headquartered in my district. These two companies have provided essential services to disabled and elderly individuals who want to live at home for years and employ thousands of companionship care workers around the nation. When this rule goes into effect, there is no question that these employers will find it more difficult to employ companion workers.

Fighting against proposals to repeal companionship care’s exemption from the Fair Labor Standards Act (FLSA) has been an uphill battle. Last Congress, my legislation, H.R. 3166, would have statutorily exempted companionship care services

from the FLSA. This would have taken away the Department of Labor's discretion in exempting companionship services from FLSA requirements.

Proponents of the Department of Labor's new rule argue strenuously that workers in companion care settings ought to have the right to minimum wage and overtime pay. I believe that companion care workers deserve a great deal of respect and I have a deep admiration for the job they do.

In the 111th Congress, I introduced H. Con. Res. 59, which recognized caregiving as a profession and encouraged the Department of Health and Human Services to educate those in need on the different options available for care settings. That legislation passed the House 387-0 and the Senate by Unanimous Consent. I think Congress agrees with me that the profession is incredibly important, especially in light of the fact that about 10,000 people turn 65 every day.

But the admiration we have for those who provide companionship services cannot allow us to leave seniors and the disabled behind. I cannot support a redefinition of the companion care labor market on the backs of the very clients these workers are helping. The rights of employees have to be balanced with the civil rights of the elderly and individuals with disabilities.

Under the Americans with Disabilities Act, individuals with disabilities have the right to be cared for in a setting of their choosing. The new rule puts this right in serious jeopardy for the most economically disadvantaged members of the disabled community.

The state officials charged with distributing federal funding for care to a setting of an individual's choosing are going to have a tougher job when this rule goes into effect. By redefining companionship care, the employer-employee relationship becomes a problem in a number of care settings. A person caring for a relative may be considered an employee subject to minimum wage and overtime rules.

Suddenly, the Medicaid stipend that person received for caring for a relative balloons and puts serious pressure on a state Medicaid budget that is likely already in critical condition. This in turn pushes those who otherwise would be able to receive affordable care in the home to an institution. I believe this tramples on the notion that individuals with disabilities should have a choice in where they live and receive care.

Companion workers are typically paid above minimum wage, so the problem really arises when an employer is required to pay overtime. Overtime becomes a problem because if a worker spends the night at the client's home, he or she is on the clock around the clock. If in-home care is too expensive, individuals with disabilities in economic need lack a meaningful choice and in many cases will no longer be able to live at home.

Third-party companionship care providers are put in a particularly difficult spot. If their employees' hours are not reduced, these employers must pay time-and-a-half for a large number of hours every week. Rather than charging the client more and paying time-and-a-half, the employer is more likely to bring in another employee to care for the client. Where the client was used to dealing only with one or two caregivers, employers unable to pay time-and-a-half are now forced to impose another caregiver on the client. This may not sound like a big deal to some people, but it is a huge deal for disabled and elderly individuals who have developed relationships of trust with their caretakers.

These are the reasons I have fought so hard over the years to keep this well-intentioned but misguided rule from becoming a reality. The labor market is exactly what it sounds like: a market. We need to exercise some humility and recognize that federal rulemaking may be aimed at a great result while failing to account for the laws of supply and demand.

Unfortunately, this is what the Department of Labor's final rule does. The rule does not adequately account for the potential costs to Medicaid, when Medicaid is the primary payer of long-term services and supports. The Department of Labor ignored several calls from me, a bipartisan coalition of my colleagues in Congress, and several other groups to study the impacts on Medicaid.

It is folly to implement a regulation without accounting for the market you're regulating or the costs of the regulation itself. A rule that ignores supply and demand, as the Department of Labor's new companion care rule does, can incur great costs—in this case, on particularly vulnerable populations: the disabled and the elderly.

That is why it is wrong. That is why we need to stand up for our seniors.

That is why we need to stand up for the individuals with disabilities in our communities and repeal this rule.

---

[Additional submission of Hon. Mark Pocan, a Representative in Congress from the State of Wisconsin, follows:]

**Prepared Statement of Venus Brown, Homecare Provider, Milwaukee, WI**

My name is Venus Brown and I am a homecare provider in Milwaukee, Wisconsin.

I have always been passionate about caring for others, but did not put that passion into practice until I became a homecare provider over five years ago. I saw firsthand how important in-home care could be when my own daughter was diagnosed with cerebral palsy. As a mother with a child of special needs, I understand what a difference providing skilled in-home care can make.

As a homecare provider, I am able to allow individuals, both disabled and elderly, to remain in their homes with dignity. For all of my patients, without daily visits from skilled homecare workers, many would have to be institutionalized. Homecare providers are the lifeblood of Wisconsin's home and community based health system. We are the means for serving the public's health care needs in the least restrictive and most humane setting at the right cost.

Unlike a nursing home or institutional setting, while on the job, I am solely responsible for my client's care. There is no call button or coworker to call for help. While it varies from client to client, I provide vital services they are unable to perform themselves. In most cases, that includes bathing, personal care, meal preparation, daily exercise, and medication reminders. Given the complexities of the client's medical conditions, this is not an easy task. As a homecare provider, I underwent numerous trainings to deal with the complicated medical issues that may arise on the job. We learned how to properly balance meals, safely lift a disabled patient, turn bedridden patients to prevent sores, deal with a stroke victim with limited mobility, and develop motor skills through physical therapy.

Due to the demands of each client, I easily work double or triple the amount I'm assigned each week, all without pay. Not only am I not being paid for the hours I work, but the pay is not enough to support my family. My meager paychecks are not enough to buy my daughter the supplies and clothes she needs. I have had to send her to school with torn and ratty clothing and shoes. Her attire has led to her being bullied at school. The bullying at school has affected her so much, the school placed in therapy to deal with the ramifications.

I do this work because I love it. The passion is what gets me going each morning—knowing that I am helping someone directly rather than working in a nursing home. Personal relationships are formed and you can't help but get attached. Each and every one of my clients is special, and I feel honored to help them. But the low pay and hours make this profession very difficult to support my only family.

---

[Whereupon, at 11:30 a.m., the subcommittee was adjourned.]

